R 31/2

Residential Community Associations:
Private Governments in the Intergovernmental System?

With Papers from a Policy Conference
Sponsored by the
U.S. Advisory Commission on Intergovernmental Relations

acir Advisory Commission on Intergovernmental Relations

A-112
May 1989

READEX FICHE best copy available

Y3.Ad9/8:2

Members of the Advisory Commission on Intergovernmental Relations

(May 1989)

Private Citizens

Daniel J. Elazar, Philadelphia, Pennsylvania
Robert B. Hawkins, Jr., *Chairman*, San Francisco, California
Vacancy

Members of the U.S. Senate

Dave Durenberger, Minnesota
Carl Levin, Michigan
Charles S. Robb, Virginia

Members of the U.S. House of Representatives

Sander Levin, Michigan
Larkin Smith, Mississippi
Ted Weiss, New York

Officers of the Executive Branch, U.S. Government

Richard L. Thornburgh, Attorney General
Vacancy
Vacancy

Governors

John Ashcroft, Missouri
George A. Sinner, North Dakota
Vacancy
Vacancy

Mayors

Donald M. Fraser, Minneapolis, Minnesota
William H. Hudnut, III, Indianapolis, Indiana
Robert M. Isaac, Colorado Springs, Colorado
Vacancy

Members of State Legislatures

John T. Bragg, Deputy Speaker, Tennessee House of Representatives
David E. Nething, North Dakota Senate
Ted Strickland, Colorado Senate

Elected County Officials

Harvey Ruvin, Dade County, Florida, County Commission
Sandra Smoley, Sacramento County, California, Board of Supervisors
James J. Snyder, Cattaraugus County, New York, County Legislature

Residential Community Associations:

Private Governments in the Intergovernmental System?

With Papers from a Policy Conference
Sponsored by the
U.S. Advisory Commission on Intergovernmental Relations

A-112
May 1989

Preface

This policy report is one in a series of publications from a Commission project on "Rethinking Local Self-Government in a Federal System." Already published are *The Organization of Local Public Economies* (1987), and *Metropolitan Organization: The St. Louis Case* (1988). A report on Allegheny County, Pennsylvania, will be published in the near future.

Traditionally, the intergovernmental system has been thought to include the national government, state governments, and local governments of all kinds. This report suggests that the concept of intergovernmental relations should be adapted to contemporary developments so as to take account of territorial community associations that display many, if not all, of the characteristics of traditional local government.

Previous studies indicate that the vitality of local governance lies in part in the kind of diversity and differentiation among governments that can create opportunities for genuine self-government in manageable, human-scale communities. New participants enter the intergovernmental system each year. Every census of governments shows an increase in the number of municipalities and special districts serving citizens. This ever-growing intergovernmental family now should be seen as overlapping to some extent with residential community associations (RCAs). In this respect, RCAs are part of a growing phenomenon in American society: namely, the proliferation of organizations that lie within the border regions between the public and private sectors.

Established by deed covenants attached to real property, RCAs are mandatory membership associations consisting of homeowners in a subdivision or development. Although RCAs are private organizations, typically created by residential developers, they are beginning to play a role in the intergovernmental system because, like local governments, they provide quasi-public services, levy mandatory fees, and regulate resident behavior (sometimes in far greater detail than local government). Because of their functions, RCAs, like local governments, develop relationships with neighboring local governments and the state. In addition, RCAs often provide innovative opportunities for local self-government on a human scale.

RCAs can generate important benefits for their members, for developers, for local governments, and for the community as a whole. RCA members often

benefit from steady or increasing home values created by the land-use restrictions in their communities. In addition, RCAs often provide their members with a wide range of services that are not available from local government or that supplement the services provided by local government. Builders are benefited by being able to provide more attractive and marketable homes in a stable, livable environment, often at cost savings to both the developer and the purchaser. Local governments benefit by obtaining development that is self-financing, features desirable amenities, and adds to the local tax base. The community as a whole benefits from RCAs through the increased range of housing choices available to potential home buyers.

The number of RCAs has exploded during the last 30 years. Informed observers estimate that there are as many as 130,000 RCAs in the United States today, compared to fewer than 5,000 in 1960. Much of this growth results from the dramatic increase in planned unit development (PUD) zoning and condominium ownership projects.

Because RCAs are private organizations, they generally have not been recognized as participants in the intergovernmental system. Indeed, RCAs cannot be regarded as local governments in the same sense as a municipality. Nonetheless, the development of RCAs does raise intergovernmental concerns, particularly with regard to service provision, citizenship and governance, and finances and taxation.

RCAs constitute a privately organized unit for the provision of local public services. In recent years, there has been a major shift in thinking about patterns of organization of local government, particularly with regard to the delivery of services. A new consensus may be emerging around the idea that a multiplicity of local governments constitutes a "local public economy" for service delivery, which consists of a "provision side" and a "production side." Briefly, the provision side refers to making arrangements for the supply of services, and the production side refers to creating service outputs.

RCAs are clearly provision units in that they decide (1) what goods and services to provide their members, and their quantity and quality; (2) what private activities to regulate, and the type and degree of regulation; (3) the amount of revenue to raise, and how to raise it; and (4) how to arrange for the production of goods and services.

In determining what goods and services to provide, an RCA may decide, for example, to build a tennis court. An RCA may decide to regulate private activities, such as the keeping of pets. An RCA raises revenue through association fees and special assessments. An RCA makes decisions about service quantity and quality, as when it contracts for snow removal and street repair. Finally, an RCA decides how to make arrangements for the production of goods and services, often through contracts with private companies or agreements with local government.

The existence of RCAs as community provision units suggests that these private organizations substitute for local government service provision. Yet relatively little is known about their service provision activities or how they influence local government.

RCAs also raise intergovernmental questions regarding citizenship and governance. RCA membership implies very different rights, privileges and obligations than public citizenship. Yet the differences are not known to most of the public. Indeed, many homeowners appear to be unaware of the implications of living in an RCA community.

Finally, RCAs pose questions regarding finance and taxation. RCAs embody the principle of fiscal equivalence—you get what you pay for and you pay for what you get. By funding their own services through dues and special assessments, RCA members retain exclusive rights to use amenities, such as swimming pools, tennis courts, play areas, and club houses, which often are not available in other communities. At the same time, because the RCAs self-finance many services, members are beginning to call on local government for tax consideration.

Strong proponents of RCAs argue that they provide for increased local self-determination and community control, greater economic efficiency in land use, more efficient and responsive service provision, more stable neighborhood land values, and more attractive residential neighborhoods.

Critics of RCAs say that many homeowners do not understand the implications of living in an RCA community and are unprepared for community control, that RCAs do not, in fact, expand consumer choice, that RCAs can reduce the efficiency of land markets, that their regulations can be excessive, and that RCA service costs may prove a burden to members, particularly those with moderate or stable incomes. Indeed, critics argue that RCAs raise a number of important questions for the intergovernmental system, including the role of local government in regulating these organizations, the extent of tax consideration RCAs may be due, the degree to which RCAs lower the cost of public services for local government, and the extent to which failed RCAs become a burden on the public sector.

RCAs, therefore, have a partial role in the intergovernmental system. To explore this role more fully, the ACIR sponsored a conference in June 1988 and conducted a nationwide survey of RCAs in cooperation with the Community Associations Institute (CAI). This publication reflects the results of those activities. We hope it will begin a dialogue on the role of RCAs in the intergovernmental system. It will be followed by another publication, a practical guide to public officials answering the most common questions officials ask about RCAs.

The Findings and Recommendations in this report were adopted by the Commission at its meeting on September 16, 1988.

Robert B. Hawkins, Jr.
Chairman

Acknowledgments

This publication grew out of a conference on residential community associations sponsored by the Advisory Commission on Intergovernmental Relations and held in Washington, DC, June 13-14, 1988.

Thanks are expressed to the many people who participated in the conference, both those who presented papers and those who commented on them. Specifically, thanks go to: Stephen Barton, William Blomquist, Marc Burford, Tom Burgess, Jacqueline Dewey, C. James Dowden, Mark Frazier, Barbara Gregg, Doug Kleine, John Maberry, Pamela Mack, Andrew Mansinne, Dolores Martin, Dean Miller, Robert Nelson, Don Pepe, Katharine Rosenberry, Winfield S. Sealander, Carol Silverman, Dan Tarlock, Dennis Tomsey, John Watts, Marc Weiss, James Winokur, and Joselyn Wells.

Special thanks go to Ronald J. Oakerson, of the Workshop in Political Theory and Policy Analysis, Indiana University, formerly senior analyst at ACIR, for his thoughtful contributions to the project.

Thanks also go to the Community Associations Institute for its joint sponsorship of the nationwide survey of community associations. Doug Kleine of CAI was particularly patient, pleasant, and always willing to help throughout this project.

Debra Dean conducted the survey, arranged the conference, and drafted the report.

Editorial assistance was provided by Linda Woodhouse. Secretarial assistance was supplied by Lori A. Coffel and Anita J. McPhaul.

ACIR is grateful for the help of all those who contributed to this report. Full responsibility for the contents lies with the Commission and its staff.

John Kincaid
Executive Director

Bruce D. McDowell
Director of Government Policy Research

Contents

Introduction 1

Findings 3

1. Defining RCAs 3
2. Extent of RCAs 3
3. The Location of RCAs 4
4. The Growth of RCAs 4
5. Benefits of RCAs 4
6. Governmental and Intergovernmental Relations 5

Recommendation: *Focusing State and Local Attention on Community Associations* 7

RCA Characteristics and Issues 9

The Nature and Scope of RCAs 9
A Survey of RCA Officials 10
How Widely Should RCAs Be Used? 12
Intergovernmental-Like Issues Raised by RCAs 13
Emerging Responses 18
Conclusion 23

Papers from the Conference on Residential Community Associations 25

Diverse Views of RCAs

Community Associations and Local Governments: The Need for Recognition and Reassessment—*C. James Dowden* 27

The Community Association Phenomenon 27
Problems with Community Associations 28
The Challenge to Public Officials 30

The Political Life of Mandatory Homeowners' Associations—*Stephen E. Barton and Carol J. Silverman* 31

Politics and the Private Sector 31
A California Survey 32
Politics and the CID 32
Consumer Choice and the CID 34
Models of Community Associations 35
Conclusion 36

Life Cycle of an RCA—*Dean J. Miller* 39

Introduction 39
Obvious Problems 40
The Window of Vulnerability 40
Growth Chronology 40
Growth Factors 41
Think for Yourself 42
The Patriarch 42
The Folkmyths of Failure 43

Speculator Activity: A Major Problem 43
Professional Management for the RCA? Yes and No 43
New Trends: Master and Satellite RCAs 44
Conclusion 44

The Privatization of Local Government: From Zoning to RCAs—*Robert H. Nelson* 45

The Privatization of Zoning 46
The Privatization of Municipal Services 47
Private Neighborhoods and Social Values 47
RCAs for Ordinary Neighborhoods 48
Privatization and Community 50
Conclusion 51

Private Street Associations in St. Louis County: Subdivisions as Service Providers—*Ronald J. Oakerson* 55

Introduction 55
Private Street Maintenance 56
Reinvestment in Street Infrastructure 58
Access Restriction 58
Ability to Act Collectively 59
Conclusion 60

Seeding Grass Roots Recovery: New Catalysts for Community Associations—*Mark Frazier* 63

The Problem 63
The Role of Self-Assessing Covenants 63
A New Approach to Mobilizing Property Owners 64
Public Sector Challenge Grants 65
Private Sector Challenge Grants 65
Safeguarding the Disadvantaged 66
Implementation Steps 66
Phase I: Organization, Site Selection and Planning 66
Phase II: Implementation 67

Legal Issues

Condominium and Homeowner Associations: Should They Be Treated Like "Mini-Governments?"—*Katharine Rosenberry* 69

Introduction 69
Constitutional Restrictions—State Action Requirements 69
Judicial Enforcement Theory 69
"Sufficiently Close Nexus"/"Symbiotic Relationship" Theory 70
Public Function Theory 71
Consequences of Applying the Constitution 72
Statutory Restrictions 73
Conclusion 73

Residential Community Associations and Land Use Controls—*A. Dan Tarlock* 75

The Problem of Public and Private Land Use Governance 75
The Competing Interests 77
Internal RCA Conflicts 78
External Conflicts 81
Conclusion 82

Association-Administered Servitude Regimes: A Private Property Perspective—*James L. Winokur* 85

The Rise of Association-Administered Servitude Regimes 85
The Mixed Blessings of Servitude Regimes 86
Implications for Servitude Doctrine 88

Historical and Philosophical Perspectives

Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance—*Marc A. Weiss and John W. Watts* 95

Introduction 95
The Rise of the Community Builders 96
The Five Historical Periods 97
Period One: Origins (1830-1910) 98
Period Two: Emergence (1910-1935) 98
Period Three: Popularization (1935-1963) 99
Period Four: Expansion (1963-1973) 100
Period Five: Restructuring (1973-1989) 101
Conclusion 103

Residential Community Associations: Further Differentiating the Organization of Local Public Economies—*Ronald J. Oakerson* 105

Introduction 105
RCAs as Provision Units 106
RCA Formation and Governance 107
Relationships between RCAs and Other Provision Units 108
Conclusion 109

Appendices 111

1. The Conference 112
2. Attendees 114
3. The Survey 115

Introduction

The governance of local communities in the United States can be said to exist increasingly in two worlds, one public and one private. Growing numbers of homeowners are not only citizens of their local government but also members of a residential community association (RCA). Estimates vary, but informed observers believe that there may be as many as 130,000 RCAs in the United States governing the residences of about 12-15 percent of the population. This represents a 26-fold increase in the number of RCAs since 1960, when fewer than 5,000 of them existed. An estimated 80 percent of these RCAs have a "territorial" scope that makes them resemble a local community rather than a high-rise condominium.

Residential community associations have been called private governments. The analogy is at least partially accurate. In many instances, RCAs do resemble local governments: they perform public functions, such as community service provision and land management; they possess an elected governance structure; and they exercise powers, including the imposition of mandatory fees, that make them look very much like local governments. Unlike governments, however, RCAs are private organizations governed by real estate contract law and are not bound by some of the rules of conduct which, of necessity, bind public organizations.

Because of the rapidly growing number and population of RCAs, their expanding role in the overall scheme of local governance and service provision in the United States, and the paucity of research and public information on RCAs, the Advisory Commission on Intergovernmental Relations decided to take a look at this quiet revolution in local governance. The Commission held a conference in June 1988, conducted a survey in cooperation with the Community Associations Institute (CAI), arrived at a set of findings and recommendations, and authorized publication of this report.

This publication is divided into three major sections. The first section presents the Commission's findings and recommendations. Section two highlights the role of RCAs in the intergovernmental system and the problems these organizations present for local government. Section three contains the papers presented at the ACIR conference.

Findings

1. Defining RCAs

Residential community associations are mandatory membership organizations emerging from three types of residential ownership that have become increasingly common in recent years: condominiums, cooperatives, and mandatory homeowners' associations. All three have covenants in the ownership deeds that require membership in the association, establish a mandatory dues obligation to fund a range of services that may be provided by the association, and stipulate restrictions on the activities of members, enforceable by the RCA and the courts.

There are two basic forms of physical development governed by these associations. One type is territorial, encompassing multiple buildings on a common site, which may also include common open spaces, recreational facilities, streets, and facilities for other services provided by the association. The other form of physical development is the single high-rise building without any of these outside accoutrements. Although associations governing both types of development have many of the same responsibilities and relationships with their members, the territorial RCAs also have a series of responsibilities similar to those of local governments and have a broader range of relationships with the local governments within which and next to which they are located. These relationships are similar to intergovernmental relationships.

Typically, RCAs are an integral part of retirement communities, recreational communities, large-scale suburban subdivisions (and many smaller ones as well), townhouse projects (including today's version of the starter house), and multiple-building, high-rise, and mixed-use developments. In many rapidly developing areas, such as those in California, nearly all new residential development is within the jurisdiction of residential community associations as defined here.

2. Extent of RCAs

Current estimates indicate that there may be as many as 130,000 RCAs in the United States. They range in population size from fewer than ten residents to as many as 68,000. Unfortunately, there is no reliable inventory of RCAs. Even within a single lo-

cality, the number of these associations is usually not known accurately by local authorities. In Maryland, however, the need for local authorities to know of the existence of RCAs is considered important enough to have justified enactment of a state law requiring each association to register with the clerk of the county court in the county where the association is located. At present, the membership of the Community Associations Institute (CAI) is the best source for a list of these organizations. However, since membership in the institute is voluntary, that list significantly understates the number of associations.

Except for condominiums, the U.S. Census does not identify separately the housing units and population under the management of RCAs. The individual associations responding to a recent ACIR/CAI survey ranged in size from fewer that ten housing units to more than 16,000. The average size of the associations belonging to CAI is 537 units. CAI members tend to be the larger associations. Therefore, this average may overstate the true situation. A recent California survey found a significantly smaller average size.

Again relying on CAI estimates, approximately 12 percent of the nation's population may live under the jurisdiction of RCAs. That is about 29 million people. Of those, about 80 percent—or approximately 23 million people—are in the territorial type of RCA.

3. The Location of RCAs

Much of the recent growth in residential community associations has coincided with the rapid growth of the Sunbelt. According to the ACIR/CAI survey, RCAs are most common in California, Florida, and Texas. A second group of states where RCAs also play a large role includes New Jersey, New York, Virginia, Pennsylvania, and Maryland. Hawaii also has a large concentration of condominiums.

RCAs are spreading nationwide. According to the survey, every section of the nation has a significant number of them. The West has 36 percent; the South, 33 percent; the Northeast, 21 percent; and the Midwest, 10 percent.

4. The Growth of RCAs

The number of residential community associations has grown significantly in recent years. Although definitive information is not available, estimates of the number of these organizations in 1960 range from 1,000 to 4,000. Some of the pioneering RCAs have histories dating back to the late 19th Century and the early part of this century. The cooperative movement of the 1930s added to the number of association-managed communities.

In the 1960s and 1970s, mandatory homeowners' associations began to grow rapidly, in part as a byproduct of the large-scale developments that displaced lot-by-lot development in most suburban areas. Planned unit development (PUD) zoning was developed to enable public officials and developers to work together more flexibly to produce superior large-scale developments. PUDs are now one of the most common ways to develop new housing because they allow developers to cluster development efficiently within their sites to save costs on streets and utilities, while creating common open spaces and amenities that make the houses more desirable, valuable, and marketable. Developers using this method set a new standard for the marketplace that other developers had to meet if they were to remain competitive.

PUD development creates a substantial amount of common space and common facilities that local governments typically do not wish to own and maintain. At the same time, the developer usually wants to divest those properties and their management/maintenance responsibilities. The alternative to public or developer responsibility is the residential community association.

The condominium style of ownership began to come widespread during the 1970s. This style of ownership requires a mandatory association of the type defined above to manage the common properties that are an integral part of the development. State legislation had to be passed to authorize condominiums. Now, condominiums are the most common type of RCA. The ACIR/CAI survey found that 55 percent of associations are condominiums; 43 percent are homeowners' associations; and 2 percent are cooperatives or other forms.

The established PUD development techniques and new forms of ownership, along with tight local government budgets and movements toward privatization, make the continued growth of RCAs likely.

5. Benefits of RCAs

Developers, homeowners, and governments have worked together to increase the number of RCAs. They each get something out of it.

The developers are able to produce more attractive and marketable homes, which include a livable environment, not just a house. The RCA also gives the developer options to cut costs, work within a more flexible regulatory framework, and exit the project without a continuing responsibility for maintenance and management.

The purchasers and homeowners receive a range of choices in communities and service packages. They also benefit from any cost savings that the developer is able to capture through regulatory flexibility. Thus, goals for meeting the needs of special market niches and keeping housing affordable are facilitated by RCA development.

Local government gets developments that are significantly self-financing, often have additional amenities, and add to the local tax base. At the same time, RCA development relieves local government and, thereby, existing taxpayers of much of the responsibility for financing infrastructure and services.

6. Governmental and Intergovernmental Relations

Relationships between residential community associations and local governments, and between state and local governments concerning association matters, have been established and are increasing. The ACIR/CAI survey of association officials found that 56 percent of them judged the level of cooperation between local government and their RCA to be excellent or good. Twenty-three percent rated the relationship as only fair. With respect to specific types of relationships, responding RCAs rated their treatment by local governments as follows: 71 percent said that their treatment on policy issues was somewhat or very fair; ratings in the 61-66 range were assigned to school, traffic, water/sewer, park and recreation, animal control, and zoning issues; the issues of parking, pollution, new development, and local taxes received fairness ratings in the 53-58 percent range. The ACIR/CAI survey and the resource papers and discussions at the ACIR conference identified a number of issues that deserve attention:

Service separation and double taxation. Typically, the RCA provides its own facilities and services at its own expense. However, this arrangement usually does not relieve individual association members of local property tax liability for their own units or the association of liability for property taxes on the common properties. Therefore, the associations and their members sometimes pay twice for some services that taxpayers outside the association's boundaries get from local government and pay for only once. In a few localities, tax rebates or local government contracts to pay for certain RCA services help to offset this inequity.

Excluded public services. Because the property within the RCA boundaries is private, including the streets, public officials often do not enter to provide certain normal services of government without explicit permission of the owners. This fact typically excludes government from providing routine police patrols, trash collection, animal control, and the like. Some local governments and associations have negotiated agreements to enable one or more of these regular services to be provided publicly by local government.

Tax inequities. The application of normal property tax and federal income tax rules to RCAs creates two inequities compared to the non-association case. With the local property tax, association homeowners' units typically are assessed at a value that reflects their greater desirability based on the commonly held amenities. Then the amenities, themselves, are assessed and taxed as private properties. In the non-association case, these amenities typically would be in public ownership and off the tax rolls. When appealed to the courts, associations are generally successful in revising these assessment practices, but each case must go to the courts individually. A legislative solution could be more simple, fair, and effective.

With respect to the federal income tax, association dues are not tax deductible even though they pay for some of the same types of facilities and services that are paid for by deductible local property taxes in the non-association case. As the proportion of the nation's population living within RCAs increases, this lack of deductibility will affect more people. Any solution to this form of double taxation would have to be through federal legislation.

Dual citizenship and the presumption of public responsibility. As a member of an RCA, the homeowner is a citizen of the association's "government" as well as a citizen of the local government in which the association is located. If the member becomes unhappy with the association—its restrictions on life style, its style of government, or some other issue—the member is likely to call on local government for help. Increasingly, city and county consumer affairs offices are receiving such inquiries.

Some local governments have begun educational campaigns to inform association members about their organizations; some have set up dispute resolution mechanisms; and some have offered training or resource materials for association board members. Such preventive approaches may be less costly to local governments in the long run than allowing an escalation of their consumer affairs case loads.

Local governments, as partners in encouraging RCAs, and as beneficiaries of their activities, have an interest in keeping them healthy, happy, and out of the courts. Above all, local governments have an interest in helping RCAs to remain financially solvent and well managed so that they do not dissolve and shift their responsibilities to the general public. One way some local governments have kept current with association concerns is to set aside a special time for RCA presidents or representatives to meet with public

officials on a regular basis to exchange ideas and air their differences.

Development standards and public responsibility. One of the ways that developers are able to cut costs is to be released from development standards that the public sets for facilities that are to be dedicated to the public for maintenance. A variety of design and construction standards are set for purposes of safety, access, and reducing long-term maintenance costs. When the facilities are to be retained by the RCA, exceptions often are made to these public standards. Local governments, in fact, sometimes encourage such exceptions so as to help bring costs down and provide more affordable housing.

However, if the RCA falls on hard times and wishes the public to take over some substandard facilities, local government may find it impossible or very difficult to accept such facilities unless they are brought up to standard first. Usually this is an expensive undertaking. For this reason, as well as others, some localities require RCA facilities to meet public standards.

Residential community associations as political forces. As a significant proportion of the population in a local area—or in a state, for that matter—gets membership in RCAs, they gain potential political power. Because of the differences between their service and financial relationships to local governments, as compared to the non-RCA citizen, RCA residents may be inclined to vote differently on tax and service issues, and on bond referendums that will not directly benefit them. In addition, they may organize to push for greater tax equity, or for public services to their areas, or for some other RCA-related interest. In Massachusetts, a Greater Boston Association of RCA Presidents has been formed for such purposes.

Local responses and the states. In some respects, local government responses to RCAs require state enabling legislation. In other cases, direct state action is needed. The National Conference of Commissioners on Uniform State Laws have recognized this key state role in RCA affairs by issuing several model acts for consideration by the states. These acts, issued in 1980-82, address issues of condominium, cooperative, and common interest ownership, as well as issues of planned unit developments.

Recommendation

Recommendation:
Focusing State and Local Attention on Community Associations

The Commission finds that the number of residential community associations is increasing rapidly and that these associations are spreading throughout the nation. Many of these associations perform functions traditionally thought of as local government functions. In performing these functions, RCAs provide many benefits to increasing numbers of developers, homeowners, and local governments. However, both RCAs and their individual members interact with local governments in various ways, thus raising intergovernmental issues that deserve continuing attention by state and local governments in order to ensure appropriate RCA roles in the intergovernmental system.

The Commission recommends, therefore, that state and local governments recognize the potential problems of residential community associations, give careful attention to the governmental and intergovernmental issues raised by their existence and activities, and cooperate with the private sector and local homeowners to facilitate appropriate development and successful operation of residential community associations.

RCA Characteristics and Issues

The Nature and Scope of RCAs

The distinguishing feature of RCAs is that they are established by a covenant attached to the deed for a residence or residential lot. The covenant makes the owner of that lot or residence a member of an organization that possesses legal authority to assess mandatory dues, maintain common property, provide services, and regulate the uses of individual and common properties. Membership is automatic and compulsory on purchase of a property covered by an RCA. An RCA, therefore, is not similar to the typical voluntary civic or neighborhood association. The term "residential community association," as used in this report, refers to the range of associations established by deed covenants authorizing common interest governance. Another term often used to describe these organizations is "common interest development."

RCAs result from interactions among consumers looking for housing, developers eager to sell housing, and local government planning, zoning, and permit officials seeking to improve living environments and make housing more affordable. Developers create RCAs in accordance with public regulations and turn them over to residents as they buy into the subdivision.

To facilitate this process, developers and public planners, working together to keep costs down while increasing amenities in residential developments, evolved a new type of zoning, the planned unit development (PUD), which involves clustering housing, preserving open space, and economizing on service facilities. In order to obtain the necessary zoning permission for clusters, developers must provide a variety of utilities and amenities, including parks and recreation. PUDs stand in clear contrast to older "cookie cutter" developments, with street after street of identical houses, each isolated on an individual lot and without additional amenities.

Although local governments encourage PUD housing, they are often less enthusiastic about accepting public dedication of open spaces and other facilities. Developers found that they could save money on facilities if they did not have to meet public

standards for dedication. PUDs created with such facilities require a private organization, the RCA, to own and maintain them, since they cannot be dedicated to a local government.

Consumer preference also has played a part in promoting RCAs. Increasingly, consumers looked beyond the house structure to the neighborhood of which it would be a part, preferring housing in physically pleasant neighborhoods with stable or increasing home values, carefree living, and recreational opportunities. Developers responded to consumer demand by providing such amenities as swimming pools and clubhouses for the use of the resident homeowners. In doing so, the developer needed an organization to maintain the facilities after the developer finished the subdivision. The RCA was an obvious vehicle.

The developer response to consumer demand for ownership rather than rental in these "common property" communities was the condominium form of ownership. While the term "condominium" may seem to imply a single apartment-like building, condominiums can be found in many different types of structures, including low-rise buildings, townhouses and even semi-detached and detached homes. The condominium form of home ownership is relatively new and required that states pass enabling legislation.

Although local governments have been involved in creating RCAs as a by-product of new zoning and permit processes, some local governments have found themselves subject to increasing political pressure from RCA boards and members. Local governments have also entered into explicit interlocal agreements with these organizations, and in a few jurisdictions local government has started to regulate RCAs themselves.

Basic Legal Forms

Legally speaking, all RCAs are private organizations. However, their functions are often similar to local government. As a result, RCAs introduce a certain tension between the traditional concept of private property rights and the customary functions of the public sector. RCAs have three distinct legal forms: the condominium association, the homeowners association, and the cooperative. Differences among these forms have important implications for the functions of RCAs.

Condominium RCAs. In condominium associations, a homeowner holds title to an individual residence (sometimes just the interior space in the apartment unit), while holding title to the common spaces of the entire condominium *in common interest* with all other owners. In practice, this means that each condominium unit owner actually owns a partial interest in the common property of the entire condominium. However, the condominium association does not own any common property; instead, the association manages common property for the common owners. An RCA is a necessary feature of condominium housing because, without the association, no single person or organization would be responsible for managing the common property, sometimes even including the exterior of the buildings.

Homeowners' RCAs. In a homeowners' association the unit owner owns both the interior and exterior of an individual home and a plot of land around it. *The association both owns and manages common properties, such as roads, streets, open spaces, and recreational facilities.* Because it owns real estate, the association pays property taxes to local government.

Cooperative RCAs. Members of cooperatives do not own real property. Instead, they own a share in a corporation that owns and maintains the buildings, and common grounds, and facilities. Cooperatives are the least common form of RCAs.

Basic Organizational Forms

Virtually all RCAs are governed by an elected board of directors. Board members are chosen from among the unit owners, and votes are apportioned on the basis of ownership.

RCAs also display some structural variety. Some RCAs are very complex, involving a federation of numerous local associations and one or more larger umbrella associations. Reston, Virginia, is an example of this complex form. The majority of RCAs are simple in form, however, involving a single association operating independently of other associations and governed by a single board.

A Survey of RCA Officials

Because there is relatively little current, comprehensive, empirical research on RCAs, the Advisory Commission on Intergovernmental Relations sponsored a survey of RCAs jointly with the Community Associations Institute. The survey brought out a number of interesting findings:

1. There is considerable overlap between the services provided by RCAs and by local government.
2. RCAs and local governments have relatively few contacts. However, to the extent that contacts exist, they appear to be initiated by an RCA.
3. RCA officials generally believe that local governments treat them fairly. Even so, one out of ten RCAs in the survey described the cooperation between themselves and local government as "poor."

The survey was mailed to a national sample of 1,128 RCAs that are members of the Community As-

sociations Institute. Each association was mailed one questionnaire. The respondent replied on behalf of the entire organization. Four hundred and twenty-two (422) responses were received, for a response rate of 37 percent. The survey included a variety of questions about RCA characteristics, services supplied, and relationships between RCAs and local government (see Appendix 3).

RCA Characteristics

The ACIR/CAI survey indicated that RCAs are predominantly a suburban phenomenon and one that is not distributed equally across the regions of the country. The survey found RCAs to be most common in California, Florida, Texas, New Jersey, Maryland, and Virginia. This reflects the distribution of CAI membership, but probably understates the number of RCAs, particularly in New York. The undercount in New York is a result of relatively lower CAI membership compared to estimates of the number of RCAs located there. The survey also probably underestimates the number of smaller RCAs, which may be less likely to become members of CAI.[1]

The majority of RCAs responding to the survey were condominium associations (55 percent) followed by homeowners associations (43 percent) and cooperatives and others (2 percent). Table 1 displays some of the relevant RCA characteristics.

Table 1

Characteristics of CAI-Member RCAs
(in percent)

Type of Association	
Condominium	54
Homeowners	43
Cooperative	1
Other	1
Location	
Urban	24
Suburban	62
Rural	13
Region*	
Northeast	21
South	33
Midwest	10
West	36
N =	366

*CAI membership may understate the number of RCAs, particularly in the Northeast.

Although RCAs can be quite large, the number of units holding membership in the RCAs responding to the survey varied from a minimum of under 10 units to a maximum of over 16,000, with the average size at 543 units. This is significantly larger than the average size found by Carol Silverman and Stephen Barton in a survey of California RCAs for the state Department of Real Estate.[2] The average number of units is also considerably larger than the median number (153). In this instance, the median is the more representative statistic, since the average is increased by the presence of a few very large associations, while the median is not affected by the large RCAs.

The ACIR/CAI survey results also indicated that RCAs charge a wide range of fees, some of them quite modest. The average reported annual fee was $867. But the median annual fee was lower ($336). Annual fees ranged from well under $100 to over $5,000.

Focus on Territorial RCAs

One characteristic of local government is that it has clear geographical boundaries and is responsible for territory within its borders. Some RCAs are similar to local governments in this regard. They maintain, and in some instances own, real estate and facilities beyond a single high-rise building. Other RCAs, particularly urban condominium associations, are responsible primarily for the operation of high-rise buildings. RCAs can be categorized on this dimension as territorial or nonterritorial.

Territorial RCAs have the following characteristics:

- The organization is territorial in scope, that is, it encompasses real estate and has defined boundaries, much like a municipality.
- The covenants creating the RCA include mandatory membership and mandatory fees for home or lot owners.
- The organization is responsible for the regulation and management of common grounds, including, in many cases, open spaces, recreational facilities, parking lots, streets, and sidewalks.

Nonterritorial RCAs are those that include only high-rise buildings or sets of units on individual lots. These RCAs have many, but not all, of the characteristics of a territorial RCA. The chief difference is that the high-rise ordinarily has little or no responsibility for open land and associated facilities, particularly streets. A high-rise RCA, therefore, is not involved in all of the land use regulation and service provision activities that characterize the territorial RCA.

Distinctions between the two categories cannot, of course, be drawn precisely. For purposes of this report, our focus is on those RCAs that look and act like a local government, as opposed to an 18-story condominium that is one of many buildings of different types on a city block. As such, RCAs possessing some territorial authority over land and activities outside of private residential units give rise to "intergovernmental" activities and issues that are both similar to, and different from, those that arise between any

small or medium-size local government and other local, county, or state governments.

The majority of organizations responding to the survey were territorial RCAs in that they reported that their organization was responsible for more than just high rise-buildings (see Table 2).

Only 9 percent of responding RCAs indicated that they were responsible exclusively for high-rise buildings. These RCAs least resemble local governments, and for this reason the analysis will exclude them.

Table 2

Building Structure Types
(in percent)

Detached Houses	15
Townhouses	39
3-5 Story Structures	16
High-Rise (more than 5 stories)	9
Mixed	20
N =	366

RCA Services

RCAs commonly provide a variety of services, many of which are provided to other residential communities by local government. On average, RCAs reported providing 10 out of 18 services included in the survey. Condominium associations provided slightly more services (average of 10.8) than homeowners' associations (average of 9.1). The number of services provided also varies with region; RCAs in the Northeast provide, on average, 11 services, compared to an average of 9.4 in the West (see Table 3).

Table 3

Average Number of Services Provided
(average)

Total	10.0
Northeast	11.0
South	10.2
Midwest	9.8
West	9.4
N =	366

Services provided by RCAs vary by region (see Table 4).[3] Recreational services are more often found in Sunbelt states. For example, 72 percent of the associations in the Sunbelt reported providing a swimming pool, compared to 59 percent in the Snowbelt. Similarly, 35 percent of the Sunbelt associations reported providing a play area or tot lot, compared to 30 percent in the colder areas. Sunbelt RCAs also were more likely to report providing security services, such as patrol and gates or fences.

Maintenance services are provided more frequently by Snowbelt associations. For example, painting and outside maintenance is provided by 88 percent of the RCAs in colder climates, compared to 73 percent of the RCAs in the warmer areas. Snowbelt RCAs are also more likely than Sunbelt associations to provide parking lot and street repair. Of course, snow removal is far more likely in the Snowbelt (87 percent) than in the Sunbelt (22 percent).

Table 4

Percentage of Associations Reporting Providing Services
(by region)

	Sun-belt	Snow belt
Services provided more often in the Sunbelt		
Swimming Pool	72	59
Gates or Fences	44	29
Security Patrol	38	21
Play Areas/Tot Lots	35	30
Other Recreation Facilities	32	20
Lake or Beach	18	13
Little or no regional difference		
Grass Cutting in Common Areas	95	93
Trees/Shrubbery in Common Areas	94	95
Street Lighting	58	58
Indoor Community Center	39	35
Services provided more often in the Snowbelt		
Parking Lot Repair	73	83
Painting/Outside Maintenance	73	88
Trash Collection	66	79
Street Repair	63	69
Water or Sewer	61	71
Sidewalks	54	66
Tennis Courts	43	48
Snow Removal	22	87
N =	213	150

For a few services there is little variation between regions. The provision of street lighting, for example, is provided by 58 percent of the associations in both areas.

There is also variation by type of RCA (see Table 5). Condominium associations are considerably more likely than homeowners' associations to provide painting and outside maintenance, trash collection, water or sewer services, sidewalks, street lighting, and snow removal. Some of these differences result from the condominium association's role in maintaining the exteriors of buildings.

How Widely Should RCAs Be Used?

ACIR's conference on residential community associations confirmed both the growing importance of RCAs and the ambiguity of their role. As noted above, the conference concluded with a roundtable discussion that found RCAs to be a very common form of home ownership, particularly in California,

Table 5

RCA Services by Organization Type
(percent of RCAs reported providing the service)

	Total	HOA	Condo
Common Public Functions			
Grass Cutting in Common Areas	94	94	94
Trees/Shrubbery in Common Areas	94	93	96
Trash Collection	72	50	89
Water or Sewer	65	36	88
Street Repair	65	62	67
Sidewalks	59	48	66
Street Lighting	58	50	65
Snow Removal	48	42	53
Play Areas/Tot Lots	33	46	22
Security Patrol	31	36	26
Lake or Beach	16	23	10
Common Private Functions			
Painting/Outside Maintenance	79	57	97
Parking Lot Repair	77	62	90
Swimming Pool	67	62	70
Tennis Courts	45	50	41
Indoor Community Center	38	38	37
Gates or Fences	37	31	42
Other Recreation Facilities	27	29	25
N =	366	159	199

Florida, Maryland, Virginia, and New York. The strong proponents of RCAs argue that these organizations provide a vehicle for greater consumer choices, enhanced local self-determination and community control, superior economic efficiency in land use, and more efficient and responsive service provision. In addition, RCAs are sometimes claimed to stabilize neighborhood land values.

Critics of RCAs say that many homeowners do not understand the implications of living in RCA communities, that RCAs can reduce the efficiency of land markets, that their regulations can be excessive, and that RCA service costs may prove a burden to members, particularly those with moderate or stable incomes. Opponents of RCAs argue that they do not, in fact, have the effect of expanding consumer choice. The reason is that in some metropolitan areas, critics say, virtually all new housing is in RCA communities, and RCA regulations and services are similar, thus reducing consumer choice to live in non-RCA neighborhoods and among RCAs offering different packages of services and costs. Critics argue that this is a particularly serious problem with new moderate income housing, such as townhouses, which have replaced the detached starter homes of the 1950s and 1960s.

Conference participants did not come to an agreement as to how widely RCAs should be used, or what role local government should fulfill in dealing with an RCAs. They did agree, however, that the number of RCA communities has been and will continue to be strongly influenced by market forces. Some participants argued that local government regulatory processes can encourage the creation of RCAs. For example, in order to cluster homes most efficiently in a planned unit development, the developer may want to construct streets that do not meet public design standards, and thus cannot be dedicated to local government. The alternative is to keep the streets private and to establish an RCA to maintain them. Government involvement in creating RCAs may provide a foundation for arguments that local government has a responsibility to regulate them.

Participants agreed that, to date, local governments have not been deeply involved in RCA regulation. But in some metropolitan areas local governments are involved in regulating RCAs and in resolving disputes between RCAs and their membership. In general, government involvement was seen to be quite limited after the initial zoning and permit processes.

Intergovernmental-Like Issues Raised by RCAs

Because RCAs are private organizations, they would not typically be regarded as actors in the intergovernmental system. Instead, they would be treated as corporate entities, or as a special class of neighborhood organizations. Clearly, RCAs cannot be regarded as local governments in the same sense as a municipality, nor can they be regarded as full-fledged partners in the intergovernmental system. Nevertheless, for the purposes of understanding the place and role of RCAs in local governance, as well as the costs and benefits of RCAs for both citizens and governments, an intergovernmental perspective on RCAs is more useful than a traditional corporate or neighborhood association perspective.

RCAs exist simultaneously within and outside of the governmental system. That is, they exist organizationally separate from the municipal and county governments, but they have relations with the federal and state government, county, municipality, school district, and special districts. However, because RCAs are communities of people that perform public functions, they are necessarily actors in interlocal and intergovernmental relations. Because they are growing in numbers and population, RCAs pose challenges and opportunities to both homeowners and government officials. Furthermore, life inside and outside of RCA communities can represent two dif-

ferent worlds in terms of service levels, citizenship, governance, financial responsibilities, and property rights.

RCAs exist within the boundaries of one or more local governments. They receive certain services from the local jurisdictions and pay local taxes. In this sense, then, RCAs represent a form of neighborhood governance.

The development of RCAs can lead to three general types of intergovernmental activities and issues. They involve service provision, citizenship and governance, and finances and taxation.

Service Provision

Local governments have never been the sole providers of public services or the sole regulators of land use in this country. RCAs are not a totally new form of organization; the first of them was established in the 19th century.[4] What is new about the current situation is that RCAs are now much more common and are found in low- and moderate-income housing developments as well as more wealthy ones.[5] As a result, RCAs' service provision activities have a far broader impact than in the past.

RCAs commonly provide a variety of services than are often public services in other neighborhoods. Among these services are street maintenance, grass cutting, and tree and shrubbery maintenance, trash collection, and parks and recreation facilities.

Access to Services. One issue arising from RCA provision of services is access. Local governments may refuse to provide services to an RCA community that they provide for other subdivisions.

For example, local jurisdictions ordinarily pick up residential trash on a regular basis, usually weekly or twice weekly. These same jurisdictions may refuse to collect trash from RCA communities, thus requiring the RCA to provide for private pick up. One major reason for this refusal is that local government officials are reluctant to venture onto private property and potentially incur liability. In addition, some local governments do not have the special equipment necessary to empty dumpsters. In other cases, an RCA may be outside of the service area of local government jurisdiction, or private trash collection may be part of an implicit or explicit requirement for RCA development. As a result, RCA members often pay privately for trash collection.

Another method for dealing with access problems is through explicit agreements between RCAs and local governments. For example, animal control officers generally cannot enter RCA property without prior permission, except in unusual circumstances. Similarly, without prior agreement, local police do not enforce parking or traffic regulations, or routinely patrol private property. However, written agreements between the RCA and the public jurisdiction can open the subdivision to these services.

There also are issues about how access limitations affect the community surrounding the RCA. A local government seeking to locate a mental health facility, for example, might have difficulty utilizing a residential unit covered by an RCA. The covenant attached to the RCA property may prohibit unrelated persons living together, or may limit the number of persons in a dwelling unit. Thus, local government may find its facility location choices increasingly limited as the number of RCAs in the locality rises—unless it uses eminent domain.

The existence of private streets and parking lots also may pose an access issue because they can have considerable impact on traffic and parking patterns in the surrounding community. For example, if an RCA is used by commuters as a shortcut, the association could install speed bumps or close the road, generating increased traffic on nearby streets. RCAs near subway and bus stops may refuse to permit commuter parking on RCA property, thereby creating increased demand for public parking facilities.

Service Levels and Quality. Because RCAs contract privately for services, the organization decides how much service it wants and how much it is willing to pay for it. This can result in differences in service level and quality between RCA and non-RCA subdivisions within the same public jurisdiction, and also among RCAs within a single public jurisdiction.

For example, local governments set priorities for snow removal on the basis of street usage. Heavily used arteries typically are cleared first, residential streets, later. RCAs, however, contract privately for snow removal, and thus may obtain more rapid street clearing than residential areas served by local government.

RCAs also are able to provide services that may not be available from local government. An RCA may operate a commuter van pool, maintain a swimming pool, cut the grass on one's home lot, or paint the outside of homes. These services are not provided free of charge, but they may be available to RCA homeowners when they are not available to non-RCA subdivisions. Where there is sufficient variety in RCA and non-RCA subdivisions, homebuyers may choose among competing service packages offered by different RCAs and local government in selecting their home.

Distributional Considerations. Because RCAs are private organizations, they operate on a principle of fiscal equivalence, that is, members get what they pay for and pay for what they get. Unlike local governments, RCAs have no responsibility for redistributing costs and benefits within their community. Indeed, some RCA documents preclude the board of directors from making redistributive allocations of

services. As a result, RCAs set service levels with regard for their members' ability to pay, but not with regard to the services provided to non-RCA subdivisions in the same public jurisdiction. Metropolitan areas with RCA communities are likely to show a greater variety of service level and quality than areas with few or no RCAs.

In addition, RCA members and their invited guests generally have the exclusive right to use RCA services and facilities. A public jurisdiction cannot access these facilities to provide for non-RCA members and cannot use them to equalize benefits across the jurisdiction. However, the differential benefit, if any, provided to RCA members is paid for by the members themselves. If they enjoy better services, they also pay for them.

Development Standards. Another service issue relates to standards of development. Local governments typically specify design and construction standards for public facilities. Design standards refer to the dimensions and layout of facilities. Construction standards refer to materials, engineering, and methods of construction.

At one time, developers built streets and parks to public specifications, and then dedicated them to the local government. Increasingly, however, the trend is toward meeting public standards for construction but not design, and keeping the facilities under private ownership. If an RCA should experience financial difficulties in the future, the non-compliance with public design standards could present a barrier to later dedication of the facilities to local government. There has been little evidence of significant RCA failure requiring local government intervention, possibly because both government and RCA officials will undertake actions to prevent such intervention.

Performance Bonds. Another concern, expressed at the ACIR conference, was that local government generally does not now require adequate performance bonds to ensure that developers will finish promised facilities, especially private capital facilities such as swimming pools, tennis courts, and club houses. A performance bond was seen by some conference participants as a way for local government to make sure that developers live up to their promises to RCA members. But it was noted that performance bonds can be difficult to enforce and that the results are often dissatisfying. Furthermore, performance bonds were not seen as a way to guarantee that builders lived up to their promises, especially in periods of recession. It was also agreed that local governments can use a variety of techniques to ensure that developers finish projects as promised. For example, developer license renewals can be made dependent on completion of prior projects.

Citizenship and Governance

Because it is a private organization, an RCA is often compared to a business. However, because of its functions in service provision and regulation, it is often compared to local government. Participants at the ACIR conference felt that the usefulness of the business and government models depended on the extent of the influence the RCA has over the lives of its members. If the organization confines itself to providing a limited number of services, then the business model was seen as more useful. On the other hand, when an RCA has many regulations and provides a wide variety of services, the government model was seen as more appropriate.

Although no single conclusion was drawn, participants agreed that the distinction between business and government was not as important as the issue of the openness of the process by which the RCA makes decisions. If the business model is used, members are compared to stockholders, and the standards of open decisionmaking are less rigid. By contrast, if RCAs are seen as resembling governments, then it is important that their decisionmaking be done in the open. Conference participants agreed that high standards of fairness and an accessible decisionmaking process are needed in most RCAs.

RCA membership implies very different rights, privileges, and obligations than public citizenship. Yet, many homebuyers may enter RCA communities unaware of the implications of joining a mandatory organization with quasi-public functions.

Voting Rights and Representation. Residential community associations base voting rights on property holding. The board that governs an RCA is elected by property owners. In homeowners associations, each unit or lot usually has one vote, regardless of the number of residents in the unit. When an individual owns more than one unit, he or she receives more than one vote.

In condominium associations, votes are often apportioned on the basis of the size of the individual unit, with larger units receiving greater weight. Again, owners of multiple units ordinarily have the right to exercise multiple votes.

One of the results of this voting procedure is that tenants may not have a voice in RCA affairs. Some associations do permit tenant voting; others do not. Tenants generally are excluded from votes on financial issues.

Much of the debate over tenant voting centers on the question of whether tenants have the same kind of a stake in the RCA community as homeowners. For example, tenants may not wish to see property values increase because that might result in rent increases. Absentee owners may have less interest in quality of life issues than do resident homeowners and tenants. Absentee owners may cast their votes against special assessments for certain community facilities, against certain rules of behavior in homes or

the community, or against community plans to oppose development in surrounding areas.

Covenant Amendment

In many associations, particularly those established at the beginning of the boom in RCAs, deed covenants included specific regulations and restrictions. Over time, these limitations may become increasingly irrelevant or onerous for the association. Needs for change arise. However, it can be difficult to alter deed covenants. Indeed, some association covenants contain no provision for alteration. This means that an RCA would have to go to court to overturn the covenants—a difficult and expensive process and one possibly fraught with danger for the continued viability of the organization.

Other covenants can be changed, but they require a unanimous vote of the members. Since a single hold-out can veto the change, requirements for unanimity often make changes virtually impossible to obtain.

Problems with covenant changes have been addressed in three ways. First, provisions for change are now more common, disposing of the problem of having no procedure by which changes can be accomplished. In addition, many covenants now substitute supermajorities (three-quarters or two-third votes) for unanimity. This makes it possible, although not easy, to alter covenants. Another solution has been to write covenants that do not specify rules, regulations, or fees. Instead, the covenant sets out the general structure and power of the organization. Specific rules and regulations are enacted by the RCA board of directors.

Open Governing. RCA membership also differs from public citizenship in regard to public information. Because RCAs are private organizations, public sunshine and open meeting laws may not apply to them. This means that RCA members are not inherently protected by "the public's right to know."Most RCAs, however, do give notice of board meetings, and most meetings are open to all members. Nevertheless, RCAs sometimes do have problems with public notice. For example, many RCAs have no public meeting room; and no bulletin board on which to post notices of the next meeting; the board meets in someone's living room. This may give the connotation of a private meeting, even when it is not intended. Furthermore, RCA board meetings may be informal, with few notes or minutes taken.

Excessive Regulation. RCA regulations of their members can be very detailed. Indeed, RCA regulations have been known to limit the size of mail boxes, the presence of clothes lines, the number and ages of overnight visitors, among other things.[6] Conference participants agreed that, at times, RCA regulations may be so detailed as to be excessive. But there was no consensus that RCA regulations are generally excessive. There was, however, general agreement that open decisionmaking procedures are increasingly important as RCAs make more detailed regulations about the behavior of their members.

Board Immunity. Another governance issue regards board member immunity. RCA board members are charged with maintaining and enforcing RCA regulations and providing services. However, board members do not have immunity from lawsuits when carrying out their official duties.

The lack of immunity has two immediate effects. First, boards tend to be highly inflexible in allowing exceptions to RCA rules because they fear lawsuits. Second, in some cases, it is difficult for RCAs to recruit people to run for office, leaving some board positions vacant.

Neighborhood Governance. RCAs seem to satisfy the traditional American preference for local control. Because RCAs are involved in service provision and regulation on a *neighborhood* basis, they can have the effect of strengthening neighborhood governance.

RCAs provide increased opportunities for RCA members to participate in decisions affecting them most directly—home values and control over local facilities and land use.

At the same time, RCA boards, like governments, are collective decisionmaking bodies, making choices on behalf of a group. This creates micro-level RCA politics. Collective decisionmaking is often more time consuming than personal decisionmaking because numerous individuals with differing interests must reach agreement. Expectations that RCAs represent carefree living tend to be at odds with the reality of association governance.

Consumer Protection

Many of the important intergovernmental issues regarding RCAs and citizenship are consumer protection issues. Little systematic evidence exists, but there is strong anecdotal evidence to suggest that many homebuyers in RCA communities do not realize the extent of their obligations prior to purchase. Covenants are written in complex legal language and are often quite long. Buyers may not read or understand them.

Buyer Awareness. Although purchasers may not be aware of them, RCAs do have a variety of regulations that members are required to abide by. RCA covenants regulate both the physical characteristics of the unit and the lifestyles of its residents. Many RCAs regulate the exterior color of individual units, the types of trees and shrubbery on lawns, building of decks or porches, the presence of sheds and clotheslines, and the installation of antennas, among other

things. RCAs composed of vacation or resort homes may also impose a minimum size requirement for dwelling units.

In addition, some RCAs regulate the lifestyle of residents by controlling the number of residents in an individual unit, the parking of vans, boats, RVs, or the presence of residents below a certain age.[7]

Uninformed buyers often become aware of RCA restrictions when they are in violation, by operating a business in their home, by painting their front door the wrong color, by parking a boat out front, or by putting up a political sign. Such disputes can wind up in the local consumer protection office or in the courts.

Currently, the burden is on consumers to be informed about their obligations with regard to the RCA. One result has been an increase in the caseload of local consumer protection agencies. In approximately half the states, state law requires that condominium documents be disclosed to new purchasers. However, fewer states require disclosure of condominium documents on resale, and even fewer require disclosure of RCA documents for homeowners associations. Even when such documents are disclosed, they are technical and long and may not be read by the buyer.

Participants at the ACIR conference agreed that the primary disclosure issues include what to disclose, at what level of detail, and in what style and format. States require that sellers disclose the existence of covenants on real property, and thus require disclosure of the RCA. In some instances, there are additional requirements that RCA documents be made available to the potential buyer in advance of purchase. The language used to explain RCA regulations is a critical element in disclosure. Conference participants agreed that disclosure statements should include what buyers want and need to know, and in terms they can understand. But it was less clear who should or will pay for such an effort.

Another disclosure problem concerns what to disclose. Disclosure of covenants does not, alone, constitute full disclosure, particularly of the financial condition of the RCA. Conference participants noted that there is little agreement on the financial matters that should be disclosed, or how accounting practices should be standardized in making disclosures. The accounting problem is far from minor because accounting practices can influence the appearance of an RCA's financial condition. To an individual member, the financial status of the organization is nearly as important as its existence. RCAs in difficult financial conditions may be forced to make large special assessments, or large dues increases.

Although conference participants agreed that disclosure is important, it was not seen as a general panacea. Upon moving into a new home, the buyer may not be psychologically ready to confront the possibility of conflict with neighbors. For this reason, it was thought that disclosure, while useful, should not substitute for general public education. Indeed, participants agreed that more public education about RCA communities is needed. There was no consensus, however, about whether the primary responsibility for education should be borne by the developer, the association, the local government, or some combination of these actors

Notice of Financial Condition

A second issue with regard to consumer protection is the financial condition of the RCA. Many associations are responsible for the maintenance of common facilities that may require large capital expenses to renovate or repair. Examples of such facilities include streets, swimming pools, club houses, and even roofs of multi-unit buildings. The maintenance of such facilities is often funded by the RCA's reserve funds. However, where reserves are inadequate, an RCA may be forced to undertake a large special assessment to make needed repairs. Potential buyers in RCA communities are not always aware of the financial condition of the association, or of the condition of various common facilities. In such circumstances, they may be both surprised by special assessments and unable to pay them. This has the effect of increasing the cost of the home beyond what was expected.

Under California state law, buyers of homes in RCA communities must be informed of the association's financial condition. California also requires that a reserve study be conducted, estimating the useful life of relevant common facilities. A plan for financing repairs and other capital costs must be adopted by the RCA. These provisions, along with disclosure laws, give potential homeowners the opportunity to assess the actual or probable costs of purchasing in an RCA community. Where such requirements do not exist, however, buyers may not recognize their liability for additional expenses.

Finances and Taxation

RCAs pose a number of finance and taxation issues for their members and for local governments. Some of these issues involve relationships between the RCA and local government. Other issues refer to the relationships between the RCA and its members and the implications these relationships have for local governments.

Taxation. RCA members pay mandatory fees and assessments, and they receive privately provided services. Some of these services may be the same as tax-supported services provided to other, non-RCA neighborhoods. When this occurs, RCA members are taxed for services that they have already paid for

and provided themselves. Typically, there is no local tax rebate for services that government does not provide to the RCA. In addition, unlike local property taxes, fees and assessments paid to RCAs are not deductible on federal income taxes. As a result, RCA members sometimes claim they are double taxed.

Privatization of Public Expenditures. While it is known that RCAs privatize the provision of public services, very little is actually known about the extent to which RCAs substitute private for public expenditures.

Public finance statistics do not include estimates of how much money RCAs are spending on "public" services, or of the precise extent to which RCA members are subsidizing the public services provided to non-RCA homeowners.

The increasing number of RCA communities and the fact that they are estimated to include as many as 29 million people suggest that public finance statistics seriously understate expenditures for community facilities and services. In all probability, RCAs account for the most significant privatization of local government responsibilities in recent times, as measured by the amount of expenditure relief given to the public sector for capital investment and operations.

Assessments and Double Taxation. Members of homeowners' associations may experience another form of double taxation. In HOAs, the association owns common property and pays property taxes on it. These payments are funded through association dues and fees. Individual homeowners also pay property taxes on their residences. When the appraisals of individual homes reflect the added value of common facilities, homeowners are paying higher taxes as a result of being in an RCA. They are, in effect, being assessed twice for living in an RCA, once when paying for the common property through association dues, and a second time through higher appraisal of their individual homes. This problem exists in some states, but not in others, depending on their assessment procedures and laws.

Regressive Fees. The fee structures of RCAs vary considerably. Some RCAs base annual dues and fees on the size of the residential unit. Scaling fees by unit size is particularly common in condominium RCAs. Another common fee structure is to charge the same amount for every unit, regardless of its size or value. Equal fees are more likely in homeowners RCAs.

Equal fees can be regressive when they do not take into account variations in unit value or homeowner income. For example, in a townhouse community, some homes may sell for a higher price because they have a larger kitchen or easier access to public transit. When fees are equal across units, the owner of the less valuable unit is paying more as a percentage of unit value than the owner of a more valuable unit. Similarly, lower income owners will be paying a higher percentage of their income in RCA fees than will more well-to-do owners. This same relationship usually applies to special assessments as well.

Reserve Funds. Street repair, roof repair, swimming pool renovation, boiler repair, and other service responsibilities can be very expensive. RCAs must pay for these things out of their own funds. But RCA dues and fees are not set initially by the RCA board. They are established by the developer. Because developers are interested in selling their property, they do not want to impose dues so high that they will drive away potential purchasers. As a result, RCA fees may be set too low to create and maintain reserve funds.

RCAs sometimes are faced simultaneously with major renovations and insufficient reserves to cover repairs. At that point, RCA boards face levying special assessments or putting off needed maintenance and renovations.

Bankruptcy. A study by the Region 9 office of the U.S. Department of Housing and Urban Development indicates that relatively few RCAs go bankrupt. When they do, however, a problem of responsibility for community maintenance arises. If facilities, such as streets, are not up to local codes, the local government cannot take them over. In some cases, local government does not want to, or cannot, handle the added expense of maintaining RCA facilities. RCA bankruptcy, while rare, may thrust added financial responsibilities on local government.

An issue short of bankruptcy is the request of a hardpressed RCA with inadequately maintained roads for local government to take over their streets and provide maintenance out of tax revenues. Although this would put an unexpected financial burden on the local government, the same taxes that provide this service to other taxpayers are being collected from RCA members, and the politics of the issue may lead the local government to accept the request.

Emerging Responses

Some local governments, states, and RCAs are responding to the issues and concerns just described. This section of the report notes briefly some of these emerging responses without evaluation or endorsement.

Service Responses

Local governments are responding in a variety of ways to the service needs of RCAs. One response is to provide the same level of services to both RCA and non-RCA communities. Another response is to contract with RCAs for service supply.

Some jurisdictions provide services to RCA communities on the same basis as non-RCA neighborhoods. For example, Alexandria, Virginia, and Sacramento County, California, collect trash for both RCA and non-RCA communities.

Reston, Virginia, is an example of contracting. The Reston RCA has a contract with the state to cut the grass along state highways located in Reston. The state pays the RCA the same amount of money that it would have spent on this service. But Reston's costs for grass cutting are so much lower that they cut the grass much more often than the state would. In other words, Reston is providing more service than the state, but at the same cost.

Some RCAs have organized to enter the political process. In Boston, the Greater Boston Area Association of RCA presidents has been formed as a lobbying organization to push for public services to RCAs.

Ultimately, some RCAs have become governments. One example is Pennsbury Village, a condominium outside Pittsburgh that became an independent borough government, in part to avoid accepting sewer services from the township. The Oronoque Village (Connecticut) RCA formed a special tax district in order to provide services and obtain tax deductions.

Development Standards. One response to substandard RCA facilities is for increased cooperation and communication between RCAs, developers, and local governments. For example, Prince George's County, Maryland, will not approve construction of RCA facilities that do not meet public standards, which include gradations that permit construction and design to take into account usage levels. In other instances, local governments have been willing to approve facilities that meet public standards for construction and materials, but may not meet public standards for dimensions and layout.

Local governments are also beginning to cooperate with RCAs in issuing construction permits to individual homeowners. For example, in Irvine, California, applicants for building permits must certify that they have the approval of their RCA's architectural review board as part of the permit process. In Marlton, New Jersey, the town will not approve construction permits without RCA approval of the project.

Explicit Agreements. There are several examples of service agreements giving public officials the right to enforce traffic and animal control regulations on RCA property.

For example, Fairfax County, Virginia, has a program for written agreements between RCAs and the police that allow patrolmen to enforce public parking and traffic laws on RCA property. Of course, police officers cannot enforce RCA regulations.

Using another approach, Montgomery County, Maryland, has passed a special animal control ordinance that treats condominium common areas exactly like public streets, parks, or private residences. This ordinance makes it illegal for owners to allow their dogs to litter on any common areas or other private sections of association property.

ACIR conference participants endorsed the concept of agreements between RCAs and local officials for such services. Explicit agreements protect both RCAs and local governments by specifying the conditions under which local officials may enforce public laws on private property.

Citizenship Responses

Among the most important local government responses to RCAs are efforts to increase communication between local officials and RCA board members. For example, a citizens' forum consisting of RCA presidents has been formed in Irvine, California. Forum members meet regularly with city officials to air concerns and share information. This allows local officials to spot problems as they are forming, rather than to wait until they are fullblown and potentially harder to resolve.

Acting like Government. Another emerging trend is for RCA members and boards to become more aware of their role in the political process. The Community Associations Institute advises RCA boards to act "as if" they are local governments, with regard to ensuring open meetings, sensitivity to minority rights, public notice, and due process.

Conflict Resolution. As conflicts arise between RCA boards and their members, litigation can result. One response to this problem is for local government to sponsor mediation and arbitration programs.

Montgomery County, Maryland, has established a mediation/arbitration program available to all RCAs in the county. RCAs are required to participate in the program before disputes move into the courts. The decisions of the hearing examiner are not legally binding, but can increase communication and facilitate less formal agreements and solutions. The state of Florida also sponsors an arbitration program.

Some participants in the ACIR conference questioned whether local government was the proper source of mediation and arbitration, since other organizations also provide this service. It was agreed that local government might be able to provide a neutral framework for handling disputes. But questions were raised as to whether the existence of disputes indicated an earlier failure of local government to regulate RCAs sufficiently to prevent problems.

Flexibility. One solution to the problem of inflexibility in association documents is the current trend toward transforming such documents into more general enabling guidelines that resemble constitutions. These more general covenants substitute for specific requirements written into the deeds and avoid the pitfalls of overly specific permanent requirements. The National Conference of Commissioners on Uniform State Laws has drafted model legislation covering various aspects of RCAs, including condominium ownership, planned communities, and cooperatives.

Another solution to this problem is state legislation that allows RCAs to go to court to amend association documents. California has passed such legislation.

Consumer Protection. Perhaps the best form of consumer protection is consumer education. The Community Associations Institute sponsors educational programs throughout the country for RCA board members. Some local governments also are taking on this task. Fairfax County, Virginia, for example, offers a training manual on how to manage an association.

Finance Responses

There are a number of solutions emerging to problems of RCA finance and taxation. One of the most sensitive problems is that of double taxation, in which homeowners' association members pay taxes twice on the value of the common ground and facilities. Indeed, the ACIR/CAI survey showed that nearly one-third of RCA officials surveyed said local government taxes were "unfair."

The assessment issue is a technical one, and a number of states have moved to alter assessment procedures to prevent such double taxation, among them Virginia, California, Illinois, and Texas.

Reimbursement Programs. Another problem for RCAs is that they sometimes must pay privately for services that are provided publicly to other residential areas. One solution to this problem is tax rebates and credits. Montgomery County, Maryland, will make a cash payment to an RCA for street maintenance, provided that the RCA allows general public access to the street and meets other requirements. Houston and Kansas City also have tax rebate programs. Tax rebates remain the exception rather than the norm, however.

RCA Official Attitudes Toward Governmental Issues

Level of RCA-Public Cooperation. The ACIR/CAI survey included questions on the relationships between RCAs and local governments. A 56 percent majority of the associations rated cooperation between their RCA and local government as "excellent" or "good." However, another 33 percent rated cooperation as "fair" or "poor," indicating a sizable undercurrent of dissatisfaction within an otherwise generally favorable environment (see Table 6).

Table 6

Evaluation of Level of Cooperation between RCA and Local Government
(in percent)

	Total	HOA	Condo
Excellent	16	17	16
Good	39	36	41
Fair	23	26	21
Poor	10	13	8
No contact	6	4	6
Don't know	1	1	2
No answer	5	5	6
N =	366	159	199

Fairness of Local Government. RCA officials also were asked to rate the fairness of local government to their organization with regard to a series of specific government activities. A majority of respondents rated local government as "very fair" or "somewhat fair" with regard to all of the specific government activities included in the survey (see Table 7).

The activity rated most highly for fairness was police protection, with 71 percent rating local government as either "very fair" or "somewhat fair." The activity regarded as least fair was local government

Table 7

Evaluation of Local Government Fairness with Regard to Specific Activities
(percent)

	Fair	Unfair	Don't Know/ Blank
Police Protection	71	18	11
Traffic Patterns around your Community	66	17	17
Parks and Recreation	64	11	25
Locating Stop Signs/Lights	64	18	18
Schools	63	8	29
Animal Control	62	16	22
Traffic Patterns through Your Community	62	13	25
Zoning	62	13	25
Water/Sewer	61	19	20
Parking in or around Your Community	59	16	25
Environmental Pollution	58	11	31
Development/Growth	56	19	25
Local Government Taxes	52	27	21

N = 366

taxes. Thirty percent of the RCA officials rated local taxes as either "somewhat unfair" or "very unfair." Indeed, for many of the activities, between 15 percent and 20 percent described local government as unfair, again indicating an undercurrent of concern.

These survey results should be regarded as tentative because RCA officials may have views about their relationships with local government somewhat different from individual RCA members and local government officials, neither of which group was surveyed.

A substantial proportion of the associations in the categories "don't know" or "no answer" simply left the questions blank. There is no clear explanation for this phenomenon. However, it may be that RCA officials have given little thought to their relationships with local government and skipped these questions, rather than struggle to answer them.

A fairness scale was created from these variables to summarize association ratings of the fairness of local government. Larger numbers on the zero to 100 scale indicate that local government was rated as fair on a greater number of activities.[8] Condominium associations generally rated the fairness of local government slightly more highly than homeowners' associations. The average fairness score for condominium associations was 56.0 out of a possible 100, while the average fairness score for homeowners' associations was 52.1.

Average fairness scores were not related to the age of the association or the number of units. However, there was some variation by region. Average fairness scores were highest in the Midwest and West and lower in the Northeast and South (see Table 8).

Table 8

Fairness Scores by Region

Region	Fairness Score	Number
Northeast	51.4	75
South	49.5	121
Midwest	64.5	36
West	56.5	131

N = 363

Fairness scores also varied across population density: RCAs in urban areas rated the fairness of local government more highly than those in suburban areas, and especially rural areas (see Table 9).

Association Influence on Local Government. Relationships between RCA officials and local governments appear to be based on a predominant stream of influence running from the RCAs to the local government, with much less influence running in the opposite direction. When questioned about attempts of associations to influence local government with regard to 13 public services, the most common pattern was for associations to report that they did not attempt to influence local government with regard to each specific service (see Table 10). RCAs reported attempting to influence local government with regard to an average of 3.7 of the 13 services. Homeowners' associations reported attempting contact on a slightly larger number of services (average of 4.3 services) than condominium associations (average of 3.2 services).

Table 9

Fairness Scores by Density

Density	Fairness Score	Number
Urban	58.5	89
Suburban	53.8	226
Rural	47.5	47

N = 362

Table 10

Has Association Attempted to Influence Local Government? With Regard to . . .
(percent yes)

Specific Services	Total	HOA	Condo
Police Protection	48	54	43
Locating Stop Lights/Signs	41	49	36
Traffic Patterns around Your Community	35	38	33
Development/Growth	33	42	25
Parking in or around Your Community	32	37	28
Traffic Patterns through Your Community	32	40	27
Zoning	30	33	26
Animal Control	24	31	18
Water/Sewer	23	21	25
Local Government Taxes	23	22	25
Environmental Pollution	18	21	16
Parks/Recreation	17	24	12
Schools	13	20	7
N =	366	159	199

Although nearly half (48%) of the responding associations reported that they had attempted to influence local government with regard to police protection and 41 percent reported attempting to influence local government with regard to the location of stop lights or signs, a majority of associations reported that they had not attempted to influence local government with regard to 11 of the 13 services. This suggests that the typical relationship between an RCA

and local government is, as one respondent put it, "We leave them alone and they leave us alone."

Reportedly, one of the services that often causes considerable contact between associations and local government is trash collection. This service was not included in the survey, so it is possible that the results understate the extent to which associations attempt to influence government.

A detailed analysis of attempts to influence local government indicates that there is a difference across association types. In particular, homeowners' associations are markedly more likely than condominium associations to attempt to influence local government about:

- Development/growth
- Locating stop signs/lights
- Animal control
- Schools
- Traffic patterns through the community
- Parks/recreation

Although the reasons for HOAs' greater propensity to attempt influence were not probed, they might result from lifestyle differences between homeowners and condominium owners. It is to be expected that the proportion of families with children would be higher among HOAs than condominium associations, while condominiums would have higher proportions of single people, childless couples, and retired persons.

Additionally, the HOAs responding to this survey are typically larger associations than the condominium respondents. The median size of the HOAs is 255 units, while the median size of the condominium associations is 104 units. This may indicate that homeowners' associations cover a larger geographic area than condominium associations. A greater geographic area may explain the HOAs' greater concern with stop lights and signs, development, and animal control.

Some participants at the ACIR conference warned that a failure of local government to respond to the concerns of RCA members would, in time, result in political action. In areas in which RCAs are prevalent, this can mean an effective "takeover" of local government by RCA members. Conference participants did not agree that local governments are generally unresponsive to RCAs. Nor did they feel that political activity was a definite threat to local government.

Local Government Influence on RCAs. The survey also included questions about local government attempts to influence community associations (see Table 11). Here the pattern is clear. As infrequently as RCAs report attempting to influence local government, they report even fewer attempts by local government to influence them. Among the 13 public services tested, local government influence was reported most often (14) for police protection and water/sewer services.

Table 11

Has Local Government Attempted to Influence Association? With Regard to . . .
(percent yes)

Specific Services	Total	HOA	Condo
Police Protection	14	14	13
Water/Sewer	14	15	13
Traffic Patterns around Your Community	13	12	13
Zoning	13	13	13
Development/Growth	13	16	9
Locating Stop Lights/Signs	11	15	8
Traffic Patterns through Your Community	11	13	8
Environmental Pollution	9	8	10
Local Government Taxes	9	12	6
Parks/Recreation	8	9	7
Parking in or around Your Community	8	8	9
Schools	6	8	3
Animal Control	5	4	6
N =	366	159	199

Local governments did not appear to be more prone to contact homeowners' associations than condominium associations with regard to most services, although HOAs did report more frequent local government contact with regard to development, locating stop lights and signs, and schools.

Summary of Survey Findings. This nationwide survey of RCAs that are CAI members indicates that residential community associations provide a variety of services for their members, many of which are services that local governments provide to non-RCA residents. The number of services RCAs provide is related to the region of the country in which they are located and, to a lesser extent, the amount of average annual dues.

RCAs report relatively few contacts with local governments. Those contacts that are reported are generally initiated by the RCA, rather than government officials. Homeowners' associations typically report initiating slightly more contact with local governments than do condominium associations, especially with regard to development, locating stop signs/lights, animal control, schools, traffic patterns through the community, and parks and recreation.

In general, RCA officials rate local governments as fair with regard to specific services, and they rate cooperation between the RCA and local government

as excellent or good. Even so, there appears to be an undercurrent of concern. Thirteen percent of the HOAs and 8 percent of the condominium associations described cooperation between their association and local government as poor.

Conclusion

Residential community associations are beginning to raise significant issues of an intergovernmental nature, despite the fact that they are private organizations. Although RCAs provide services and fund them through private payments, they are not isolated organizations. RCA activities have an impact not only on their own members but also on neighboring developments and the community as a whole. For this reason, local governments have been drawn increasingly into dealing with RCA officials and coping with RCA impacts on the community at large.

This suggests that local and state governments increasingly need to be aware of RCAs and their effect on the interlocal and intergovernmental systems.

NOTES

[1]The mail survey sampled 1,128 RCAs that are members of the Community Associations Institute. Each association was mailed one questionnaire. The respondent replied on behalf of the entire organization. Four hundred and eleven (411) responses were received for a response rate of 36%. The survey included a variety of questions about RCA characteristics, services supplied, and relationships between RCAs and local government.

[2]See discussion by Barton and Silverman in this volume.

[3]The states in the Sunbelt include: Arizona, California, District of Columbia, Florida, Georgia, Hawaii, Kentucky, Maryland, Mississippi, Nevada, North Carolina, South Carolina, Tennessee, Texas, and Virginia. The states in the Snowbelt include: Alaska, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. The states not listed had no associations responding to the survey.

[3]Stephen Barton and Carol Silverman, *Common Interest Homeowner's Associations Management Study* (California Department of Real Estate, Sacramento, CA, 1987) p. 43.

[4]The distinction between public and private services made here is a broad one. Many services that are privately provided in some jurisdictions are public services in others.

[5]See discussion by Weiss and Watts in this publication.

[6]See discussion by Barton and Silverman in this publication.

[7]The recent amendments to the *Fair Housing Act* outlaw discrimination against children. This means adult only communities will no longer be legal once the act is signed into law. However, the amendments do permit bona fide senior citizens' communities. That is, discrimination on the basis of age is permitted in order that retirement communities can still exist.

[8]The fairness scale runs from 0 to 100. Zero indicates that local government was rated as "very unfair" on all of the specific activities included in the survey. One hundred means that local government was rated as "very fair" on all of the specific activities included in the survey.

Papers from the Conference on Residential Community Associations

Community Associations and Local Governments: The Need for Recognition and Reassessment

C. James Dowden
Executive Vice President
Community Associations Institute
Alexandria, Virginia

The Community Associations Institute (CAI) is unusual in the national voluntary association field. CAI is one of the few organizations that encompasses within its membership the provider and consumer of the product and all of the professions that service or regulate it. CAI was created in 1973 by the Urban Land Institute and the National Association of Homebuilders to be a neutral source of information and education on how to successfully create, operate, and govern automatic membership associations, including condominiums, cooperatives, and homeowner association developments.

CAI is required by its charter to balance, at all times, the five interests that are involved in the community associations process. The national board of trustees has an equal number of developers; public officials; association managers; professional colleagues, including attorneys, CPAs, insurance professionals and others; and the community associations. The Institute is not an advocate for the builder or the homeowner; rather it gathers information, conducts research, and provides educational programs to promote the best approaches to ensuring successful community association living. CAI urges state and local governments to be supportive of the development of this form of housing, and not simply to regulate and oversee it.

The Community Association Phenomenon

Understanding the community association phenomenon starts with recognizing the tremendous and rapid growth of this new form of housing, from fewer than 500 residential membership associations in 1962 to an estimated 120,000 to 130,000 associations housing more than 29 million people in 1988.

We see today much more interest among academic institutions and governmental bodies in examining this new housing phenomenon in order to better understand what has happened and how such developments should be viewed, regulated or controlled in the future. To do that, we need to understand why this popularity and this growth have occurred.

The traditional form of housing ownership in the United States was the single-family home on a lot or, more recently, in a multiunit subdivision. Various trends and movements came together in the 1960s to start to bring about a change in this approach to housing. The principal force, in my opinion, has been economics. The cost of land in desirable locations for ownership housing was increasing steadily, sometimes dramatically. At the same time, the cost of construction in the years of double-digit inflation was approaching astronomical levels.

Coincident with this economic trend was the shift in attitudes of public and private planners away from the traditional suburban style subdivision toward more creative planning and zoning concepts, including the planned residential development, planned use development, mixed use development, and other techniques. Local governments passed ordinances providing bonuses and other inducements to encourage builders and developers to use more creative site design techniques in residential housing.

Finally, shifting needs and capabilities of local governments affected the overall trend toward these forms of housing. Over the last three decades, local governments in increasing numbers have begun to impose on new developments a larger share of the burden of providing the public facilities and services necessary to support the intended new population. To the extent that the developer provides these publicly mandated facilities and services within existing design and construction standards, presumably the local government would accept future maintenance responsibilities. Achieving those standards frequently is not consistent with the economic goal of lower unit costs, and, in the face of consumer taxpayer revolts, local governments were not always willing to accept such dedication. If the developer provided such facilities to a private, nonprofit association of unit owners, however, then public design and construction standards would not have to be met, nor would public agency acceptance and dedication of such facilities be required.

These forces and a concomitant shift in attitude of the buying public to the grudging acceptance of ownership housing in group situations has led to the significant proliferation of community associations. The needs to design a development with a maximum number of units to the acre, to provide private facilities and ownership of those facilities, and to assure ongoing maintenance of the facilities and the services necessary to service the group housing situation, have created common properties and mandated the use of the homeowner association as a vehicle for owning and maintaining these properties.

Homeowner associations, then, are a necessary byproduct of recent shifts in the forms of housing ownership. The developer is relieved of the burden of long-term maintenance through the transfer of that responsibility to the owners association as sales are completed. At the same time, local government is relieved of the burden of maintenance of what would otherwise be public facilities (such as streets and roads, outdoor lighting, and storm drains) and has an assurance that an organizational mechanism is in place to maintain other property held in common, such as open spaces, park areas, and swimming pools.

Community associations have emerged on the housing scene, some would say, almost unseen. Many states and localities are only now becoming aware of the substantial existence of community associations. CAI's surveys indicate that more than 50 percent of all new housing for sale in the 50 largest metropolitan areas are now condominium or homeowner association developments. There's no indication that the economic forces or the design and service standards imposed by local governments are going to change in the near future, and we can expect an ever increasing proportion of housing to be in community associations.

Problems with Community Associations

CAI has noted a heightened awareness and concern in the academic community and among state and local government officials and agencies regarding this trend toward community association housing. Some of this arises because of what appears to be a transfer of governance to a small or local subunit. Community associations have been compared to mini-governments that have significant power and responsibilities, and concerns are expressed about the extent and manner in which community associations exercise that power, or whether or not there needs to be some public agency control and oversight.

From time to time we hear the concern, too, about what will happen if the community association, for whatever reason, is unable to perform its maintenance and governance functions. What entity will step forward to maintain the private streets, the facilities, and the open space and, indeed, even the buildings? What steps should be taken at the state or local level to assure that community associations have the capability and capacity to carry out their responsibilities over the long run without becoming a burden on local governments at some future time?

Within the community association field, different concerns and issues have surfaced from time to time. From the developer's perspective, there is the feeling that quite often community associations are created for the sole purpose of maintenance of property and facilities that would not be required, if it were the developer's choice, except by local government standards or regulations. Public street standards, in both design and construction, frequently exceed what is necessary for residential subdivision,

pushing the developer to provide private streets that need a community association to maintain them. Similarly, in the subdivision negotiation process, local governments quite often seek to achieve other public goals by having the developer provide facilities that by their nature must be privately maintained, such as bike paths, pedestrian nature trails and paths, preservation of open space and park land, and passive recreational sites. To the extent that private facilities and services are provided either to meet local government desires or to avoid local government standards, the developer must create homeowner associations to maintain them, with costs, processes and procedures that most developers would surely avoid if they could.

Homeowner association leaders cite different kinds of problems with this form of housing. CAI frequently hears of problems with the quality of legal documents, inadequate funding, poorly crafted budgets, inadequately constructed facilities and residences. State governments are beginning to address the document problem by developing more specific standards, and increasing numbers of local governments are reviewing such documents prior to final project approval. Moreover, federal lending-related organizations are intimately involved in setting standards for such documents today. A few states have begun to take steps to assure adequate budgets and adequate funding for the association. This, too, should be an area of concern to local government, more so than has been evident thus far. Local government has a stake in the successful maintenance of common property in a community association. Maintenance costs money, and there must be adequate funding in order to assure that maintenance takes place. If the association is poorly funded, there will be inadequate maintenance, and community leaders will look to the local government for maintenance of the privately owned public-like facilities, such as streets, roads, and street lighting.

Local government could have a more dramatic impact on the community association field through its legitimate function of overseeing design and construction of buildings and other structures. At the time these facilities are built, there is no advocate for the ultimate consumers who will be responsible for maintenance and repair. To the extent that there are legitimate problems with the site and building design and construction, the local government could be brought into play.

Another issue that CAI sees emerging, which should be of increasing concern to state and local governments, is a growing awareness by homeowners in community association developments that local government policies and practices treat such developments differently from traditional forms of single-family housing, frequently resulting in fewer public services being delivered and higher costs to community association dwellers for such services. Commonly cited problems are the refusal of local governments to permit public officials and public vehicles to carry out their normal functions within community association developments. Classic examples are the refusal to provide public trash collection and removal services in such communities, either because the streets are privately owned or because the municipality views such developments as they would rental apartment buildings where they also do not provide such services. Some have described local government policy and regulation as having the effect of treating community association developments generally with a rental apartment mentality. As a result, there is a feeling by the homeowners in such developments that local governments are not treating such communities fairly and equally. Local governments need to recognize association communities as legitimate forms of home ownership that contribute their fair share to the tax base; government needs to be flexible in providing public services to meet those homeowners' needs. If local governments are to continue to encourage planned unit developments, cluster housing, and other forms of creative design, they should similarly be flexible in establishing design standards for the public-like facilities within such communities so that such facilities need not be private. Having met the goal of creative design, local governments ought not then penalize the residents by not providing public services because the facility constructed is not publicly owned and maintained.

Local and state governments need to be sensitive to the property taxation issue. I really believe that a tax revolt is likely in jurisdictions with a high concentration of community associations. Until challenged, it is quite common for local tax agencies to attempt to impose a property tax at highest and best use on the common property owned by the association, while at the same time attributing the value of the presence of such common property to the value of the individual units in determining their tax burden. From the perspective of the homeowner in such communities, then, not only are they not receiving the public services that single-family homeowners within the jurisdiction have come to expect, but they are also being taxed twice for the honor. From the association's perspective, common property is so encumbered by covenants that it has no value and cannot be sold. Some states and localities have come to recognize the inequities of the property tax assessment process in this regard, and have taken steps to deal with it through legislation or regulation. It continues to be a problem in many jurisdictions, however. This property tax conflict exacerbates the dispute regarding the public service inequities from

the perspective of the homeowner in community associations.

The Challenge to Public Officials

The challenge faced by public officials at all levels is the potential that residents in homeowner associations and condominium communities may emerge as a viable and significant political interest group. This has begun in some communities. Condominium and homeowner association members treated as "second-class citizens," with an apartment renter mentality by governments and public officials, have, in an increasing number of cases, organized themselves to effect changes in public policy through elections. To the extent that such community associations become dominant forms of housing in a given jurisdiction, the prospects for such a reaction increase. In jurisdictions throughout Florida, and some areas of California, Chicago, and New York, we're seeing representatives of community associations at public hearings and routine public meetings, demanding the services and treatment that residents of other forms of housing are receiving.

Local governments are way behind the curve in comparison to most other professions and interest groups in responding appropriately to this new form of housing. Until now, for the most part, state and local governments have been passive observers, if not encouragers, of this form of housing or policies resulting in this form of housing. Now, with the continued growth of this trend, state and local governments must respond appropriately by evaluating how community association developments are functioning, what local government regulations and policies affect them adversely, and what steps should be taken to correct the inequities that may exist to burden this form of home ownership.

The rapid growth of community associations has caught many by surprise. We are still learning about them and how they function, about how best to approach, manage, and govern this form of housing. Despite their problems, community associations are functioning very well, for the most part. There are techniques that we can use to improve the quality of life in community association developments and the processes that involve state and local governments, developers, property managers, and others. As long as this type of housing is necessary in the marketplace, the community association development will continue to increase as a form of home ownership. We need to respond in a timely fashion to the challenges that this form of housing present to all of us.

The Political Life of Mandatory Homeowners' Associations

Stephen E. Barton
and **Carol J. Silverman**
Project Directors
Institute of Urban and Regional Development
University of California, Berkeley

A quiet evolution has occurred in local politics, shifting part of the political process into the private framework of the mandatory homeowners' association, what this volume refers to as the residential community association. It is well known that common interest developments (CIDs), where common property and community rules are maintained by a mandatory homeowners' association, have assumed some of the traditional responsibilities of local government, such as road maintenance and enforcement of parking regulations. What is less well understood is that they have also moved politics into a private setting. We will suggest that political life in a private setting shares many characteristics of more usual forms of political behavior, but that it also poses special problems because of the dominance of cultural models that separate private life from politics.

In our view, the mandatory homeowners' association in a common interest development is a privately owned political entity—a private government. In the following pages we will use the findings of the first statewide survey of homeowners' associations in California to describe their political life. We argue that the privatization of public functions does not result in the end of politics, but rather in the encouragement of the use of private models of social involvement, with the result that residents have serious difficulties in mediating and resolving their differences. We conclude that caution is needed in using homeowners' associations to carry out traditional public functions and that this form of privatization requires government support and regulation to function successfully.

Politics and the Private Sector

Politics, according to Bernard Crick, is the means by which civilized people reconcile their differences and arrange to cooperate with each other without resorting to violence.[1] Politics is an inherent part of life wherever people must associate themselves. The important phrase is "must associate." If the relationship is voluntary, then politics is not necessary—peo-

ple who disagree simply separate, unless there are preexisting sentimental ties to balance against the disagreements. When people cannot disassociate themselves, then they must either cooperate in spite of their disagreements, that is, engage in politics, or else resort to force in order to impose a decision.

Politics is a very difficult activity. To cooperate with people yet disagree with them requires constant efforts to compromise while remaining principled. When some people believe they have certain rights and when others believe they hold contradictory rights, it is difficult for both sides to work together and to grant legitimacy to each others' beliefs. It is not surprising, then, that people may distrust those who engage in politics and feel that no one would alter and compromise rights without being motivated by personal gain or power. The threat of force is ever present behind the political process.

The private sector is a domain supposedly shielded from politics. Although it is well understood that the rights and limitations of property ownership are determined within a political process, it is also assumed that once people purchase property their rights as property owners create a zone of freedom. Within this zone, they are free to choose to associate themselves with neighbors or to remain separate. Politics can intrude, of course. Voters may require growth controls, neighbors may ask for zoning restrictions, or builders may propose new uses in the vicinity. But the decision to engage in the public political process is voluntary, and the activity is oriented toward external governmental channels. Further, when neighbors associate themselves and their property voluntarily, it is usually to implement common goals on which there is little disagreement, typically to increase the value of their property. Such business or community relationships are matters of private choice rather than public necessity.

This model of the separation of private and political life has never been completely accurate, but it is particularly inappropriate when we consider the common interest development. There, private ownership of property serves to join owners together in a mandatory homeowners' association rather than separate their domains. Our research on CIDs explores the difficulties that result from the creation of political life within the private sector.

A California Survey

In 1986 and 1987 we carried out a study of CIDs for the California Department of Real Estate.[2] The research first involved interviews with 25 individuals, such as lawyers, managers, and developers, who are involved with these associations in a professional capacity. We then conducted a statewide random survey of board presidents of these associations, using the state corporations, listings of non-profit, mutual benefit associations to draw a sample of associations. We received 579 usable returns, representing a 77 percent response rate.

Since the following analysis draws on the survey results, it is important to point out potential sources of bias in the returns. We are aware of two such sources. First, small associations, which are less likely to incorporate and thus to appear in the sampling frame, are underrepresented. Second, we would guess that poorly managed associations are underrepresented. Such associations are more likely to be negligent in updating their corporate listings.

Furthermore, internal analysis shows that the less well-managed associations were later in returning their questionnaires. It is to be expected that the nonreturns included a high percentage of such associations. Late returns were not distinguishable in any other way. They were, for example, no different in size, price, housing type, or type of management.

Finally, we supplemented the survey with 12 case studies in which we interviewed board members and managers, looked at association documents, attended a board or annual meeting, and interviewed other people active in the association. In all, we conducted 50 interviews with association members.

Politics and the CID

Common interest developments may be organized as condominiums, planned developments, and cooperatives. They are defined by the presence of common property, by rules governing the use of common and individually owned property, and by a mandatory homeowners' association whose elected board has the responsibility for enforcing these rules for maintaining the common property and financing their activities through assessments on all property owners. These attributes involve the board and membership of the association in political activity.

The CID unites owners in an involuntary relationship. Members do not choose or necessarily even like each other, yet they own property in common. Because property is jointly owned, members must establish a set of guidelines for its use and upkeep. Typically, this is accomplished by the developer, who provides a set of governing documents before any owner purchases property.

Once established, these rules are binding. Members and residents who violate them can be punished by the denial of use privileges; by fines, liens, and even foreclosure; and in extreme cases by prison terms. Only with the vote of a majority or super-majority can the rules be changed. Thus, owners and residents must abide by the preexisting rules just as do new residents of any municipality.

These rules create standards that permit residents and owners to live together and maintain the common property in ways that sometimes preserve the rights of the group or a subset of the group at the

expense of individual members. The governing board of a homeowners' association has to engage in politics in order to determine the extent of the boundaries of rights and obligations of the residents and owners. For example, the process by which an association decides whether absentee owners have equal rights to use limited common area facilities, or whether renters can serve on advisory boards, is no less political than the process a small New England municipality employs to set guidelines for the use of its town docks.

The political process in the CID is far from easy, and tensions are myriad.[3] To begin with, tensions result from the diversity of backgrounds and interests of the membership. The interests of residents with and without young children, for example, can come into conflict. Children are more likely to violate rules for public behavior than adults, and those without children may be less than sympathetic to this.

We found in our survey that associations with a mixture of residents in different stages in the life cycle were more likely to report rule violations, even when the percentage of households with young children was held constant. We took this to mean that such associations had greater conflicts about how the rules should be interpreted.

Furthermore, people in different stages of the life cycle have different interests. In one of our case study associations, for example, the developer promised some of the owners that a children's play area would be constructed, but did not actually build one. After the association was turned over to the owners, interested parties petitioned the board for children's play equipment. The only possible location for the installation of the equipment was the grassy area outside the residence of a couple who did not want such an area to be constructed and who certainly did not want it in front of their window. They argued that they had purchased a unit with no such neighboring activity and had the right to maintain it that way. The issue was referred to the larger association for a vote, and the proposal to build a play area was defeated. However, at least some of those who had initiated the request still felt embittered toward their neighbors.

Another source of continuing conflict can occur between those who wish to devote resources toward the future maintenance and enjoyment of the property and those who are more interested in preserving their individual resources. Absentee owners are more often interested simply in keeping their costs low, while resident owners are more interested in the quality of life in the association.

Since rule changes and dues increases often require a specified majority of all owners rather than of all voting owners, absentee owners can defeat initiatives, simply through disinterest by not voting at all, as well as by voting against dues increases which would increase their costs.

Such conflicts can also occur among resident owners. People differ in the amount of money they have available. Those who are "house poor" may not be able to afford the special assessments necessary to build up reserves or make improvements. Indeed, several of the board presidents we interviewed spoke of how high special assessments for legal fees forced some homeowners into default and ultimately into loss of property. Even those who can afford increases may be disinterested because they intend to sell shortly. As one board president wrote us, conflicts in a small homeowners' association between those who desired to live there permanently and those who wished to sell rapidly destroyed their prior friendships.

The greatest barrier to effective political debate occurs, however, not because owners and residents are heterogeneous, but because they share similar understandings of the meaning of private property. The conflict here is less between individual owners than it is between any owner and the association as a whole. Private property ownership, particularly of residential property, might be thought to bring absolute control over decisions governing use and alterations of property. In truth, this freedom is relative in all neighborhoods. Homeowners share property boundaries and neighborhoods with other residents. Whether it be a loud stereo versus uninterrupted sleep or a building expansion versus an unrestricted view, the rights of one individual to use and enjoy property as desired limits the rights of his or her neighbors. This is recognized formally by laws that place legal controls over acceptable uses of property.

Furthermore, most homeowners expand their definition of ownership to include the larger neighborhood, and feel they have purchased the rights to a particular kind of area. Institutionalized in the form of zoning and other land use regulations, this can place restrictions on individual actions. One household's rights to a neighborhood where all buildings look alike violates another's right to change the appearance of the home to suit personal tastes.

Negotiations over the appropriate definition of rights is an inherent activity in all neighborhoods. However, in non-CID developments, especially where there is some separation between dwellings and a homogeneous population, the range of negotiations is usually limited and the sphere of legal controls circumscribed.

In CIDs, because property is owned in common and the governing documents usually place exhaustive restrictions on the uses of individual and common property, negotiations over the arena of

rights occur continuously. We have no comparative data, as yet, to speak to this point, but it seems reasonable that more conflicts occur in such communities. Furthermore, in non-CID neighborhoods, conflict can be channeled into public hearings and judicial processes of representative government. In CID neighborhoods, in contrast, the agent who must enforce and sometimes set the rules is the CID's governing board, not an exterior body.

CIDs combine the need for internal political debate with a culture that equates property ownership with sole rights to determine its use. The idea that property ownership provides the right to join in ongoing deliberations with other property owners is a part of the Jeffersonian tradition, but is scarcely familiar to the modern property owner. This mismatch between the reality and the popular understanding of property in the CID is a source of many of its serious problems.

Consumer Choice and the CID

An adherent of the consumer choice model might suggest that owners choose this type of neighborhood. Such a choice allows them to select a development with rules of which they approve and to associate with other owners who share their values.

By transferring governmental functions to the private sector in this way, consumers should have a greater choice of options and can purchase amenities that match their desires. By this logic, the CID should have no greater problems than any other neighborhood, and indeed might reasonably be expected to have fewer problems. That is because residents who purchase do so with full understanding and acceptance of the governing documents that regulate issues such as noise and upkeep, which elsewhere might lead to disagreements.

Such a model has several potential flaws. The model assumes that housing consumers have a real choice. In a variety of housing markets, however, particularly in a state like California, more than half of new nonrental housing units are organized as CIDs.

Building department figures indicate, for example, that more than 90 percent of housing built for individual ownership in the San Jose area is in CIDs. In some areas, a nearby stock of older housing of equivalent or potentially equivalent quality and price is available, but that is not always the case, particularly for lower cost housing in suburban and some urban areas.

The model next assumes that consumers are sufficiently knowledgeable about the alternatives to make an informed decision. Our information here is tentative—we are currently working on a study of home buyers, which will give better evidence on this point. Our past research shows, however, that most buyers do not understand what they have purchased. This is not surprising. Traditions of home ownership equate purchase with the sole right to determine use, not with shared ownership of facilities, grounds, and walls.

We have often found the sales personnel ill-informed and also reticent about the precise nature of ownership, at least in the early stages of the sale. Although sellers in California are required to furnish buyers with the governing documents and other association records before the sale is closed, the details of the precise meaning of ownership must be teased out of many pages of legal prose.

Furthermore, even if the owners are knowledgeable about the governing documents, all residents may not be so. Unlike owners, who are given the association rules at the time of purchase, renters may not be given the rules, either by the association or their landlord, and are often excluded from sources of information, such as newsletters, which might inform them.

Fifty-one percent of the associations in our sample give new owners literature; 28 percent do so for new renters. Twenty-seven percent have a welcome visit for new owners; 14 percent do so for renters. Forty-five percent send a newsletter to owners; 27 percent do so for renters.

There is also the question of the degree of choice available to the consumer. As James Winokur points out elsewhere in this volume, most governing documents of associations are simple boiler plate, copied over and over again. As a result, there is little to choose between governing documents.

Finally, there is no guarantee that the association will maintain its character. With the exception of cooperatives, associations can regulate only weakly the precise nature of owners and residents—restricting the percentage of rental units for example—and, in our experience, few are knowledgeable about or exercise what powers they have.

We are not advocating the expansion of such powers, which have a clear potential for abuse. We simply note that owners may purchase a home in an association with a particular mix of residents, and find that its character changes over time. This has particular importance in moderately priced associations, where lenders place restrictions on making loans based on the percentage of rental units.

Members may also find that the rules themselves change in ways they do not desire. Associations can make decisions based on a majority or super-majority vote. Those who do not agree may find the governing rules changing in ways they have not anticipated. Finally, owners themselves may find their circumstances altered. A retired couple in an association that restricts residence on the basis of age, for example, may find a grown child and grandchildren

seeking to stay with them after some domestic disaster.

Of course, owners unhappy with the association have the option of moving, but this has high personal and financial costs, especially if the owner is unable to find a buyer at an acceptable price. Prices in the condominium market have not appreciated at the same rate as those of conventional housing. We might expect the resale value in troubled associations, precisely the ones owners might be most eager to leave, to be particularly affected.

To the extent that an owner has a choice about moving into an association, this choice is typically poorly informed, and there are high costs involved in making a new choice. The mandatory homeowners' association is thus as much an involuntary association as any small town government.

The inadequacy of the consumer model can best be seen by the actual behavior of residents and owners in the association. It is a rare association that does not have problems with violations of the governing rules—only 7 percent report no such problems and 25 percent report at least one violation so intractable that they were unable to resolve the problem. Furthermore, members of the association often react with anger to the limitations of the governing documents. Several of the board presidents in our case studies reported that they had been threatened with bodily harm by a resident, typically over parking infractions. It is indicative that 44 percent of the boards in the survey had been personally harassed, openly accused, or threatened with a lawsuit by a member in the past year; a strong predictor of such harassment was violations of the governing documents. Such extensive rule violations and expressions of anger indicate that most associations contain people who did not, in fact, want this particular mixture of home ownership and restrictive rules.

For these reasons, the emphasis on consumer choice is misplaced. Some people have the financial resources and/or knowledge to self-select for this type of housing, but they probably constitute a minority of all purchasers. Instead, residents and owners often find themselves in situations that violate their expectations.

Models of Community Associations[4]

Public functions that are removed to the private sphere become intertwined with widely shared models of the meaning of private ownership, models that equate ownership with individual rights to decide the use of property. Members support the restrictions inherent in the CID as they apply to others, but resent the restrictions on their own activities. Believing they have purchased a neighborhood as well as a home, they expect to maintain individual control over both.

For example, unauthorized changes to individual dwellings—changes such as a skylight cut through a commonly-owned roof or an unauthorized alteration of a balcony—were the types of governing document violations least amenable to resolution. Members took the individual residence to be entirely their own—they did not understand the notion of common property, of which they held exclusive use but not individual ownership. They did not see why they could not do as they pleased. As in the case of the individual who did not see why he should pay for repairs to a commonly owned roof over a neighbor's unit when his own roof did not leak, they further often did not understand their responsibilities for property they did not directly use.

Owners had problems understanding the general meaning of the association, and its proper role as a governing body. Their most typical model was that of a management company, which would take over many of the onerous responsibilities of home ownership. This was encouraged by the sales practice of marketing associations as "carefree living."

For example, one sales team explained that "they" (the association) took care of things like maintenance for the owner, but stressed that "you" are the association and thus decide how property is to be used.

The other typical understanding of the association, usually held in combination with the first, is that of a community of friends and neighbors. In this view, dissent and disagreement are forms of unfriendly conduct. Boards may be reluctant to enforce the rules—a form of unfriendly behavior—but become actively hostile when criticized, taking it as a personal attack and a denigration of their sacrifice in serving on the board. The idea that dissent is valuable to a democratic government is obscured by these privatized understandings of the association.

However, people who use these models have to confront the reality of the homeowners' association in a CID, a reality that includes a board with the responsibility for enforcing rules of use and behavior. Members react to this tension in several typical ways. The most common way is to not participate. The median percentage of people serving on boards, committees, or in some voluntary basis was 11 percent. Board size is set by the governing documents. If we look only at people who serve on committees or in some other way, the average so assisting the association is one-half of a percent. Only 21 percent of the associations' boards characterized their membership as giving them support. In 16 percent of the associations, fewer people ran for the board in the last election than the number of seats open.

When members have to confront the board directly, they have no constructive model for doing so. They view the board in two ways, often at the same time: (1) as a management company placing unfair restrictions on them or inadequately doing the job that the association fees supposedly purchased; and (2) as a group of neighbors with unfair powers rather than upholders of a public trust. As a result, members react with anger and sometimes overt hostility to the board's actions.

While the CID includes political functions, the membership is ill-prepared to cope with them. Cultural understandings of the rights associated with individual property ownership and the separation of private and political life lead to many of the characteristic problems of the CID.

Conclusion

Residential community associations pose special challenges to their members and residents, challenges that outstrip the capacities of many associations. Here, we have argued that a CID virtually necessitates that residents and owners engage in a political process, a requirement that demands violation of general cultural mores with regard to private property.

The CID increases owners' and residents' dependency on the financial fortunes, knowledge, and good sense of their neighbors. Members of associations that are mismanaged or plagued by owners in default of their assessments may find themselves faced with unanticipated high special assessments and/or with unsaleable units.

To function successfully, a CID requires both managerial and governing skills. Further, all buyers—buyers of moderate income in particular—need education about their purchase and protections against the potential hardships that are posed by this type of ownership. Good professional management can solve some of the problems of CIDs. However, boards, often unaware of the issues involved, may not know enough to recognize good management when they see it, and are under pressure from the membership to keep dues and management expenses low.

Furthermore, many associations are too small to afford professional management. We found that the average size of associations in California was 43 units, and that the average size of projects built in the last several years has decreased to 32 units. Most associations of 43 units or less are self-managed.

We have also found that professional managers can exacerbate the problems of low participation and commitment to the association, even as they solve problems of maintenance and financial planning.

Voluntary organizations, such as the Community Associations' Institute, can play a valuable educational role. Many CID officials, however, are unaware of the existence of such organizations. Furthermore, there is no easy way to reach these homeowners' associations to inform them of available resources.

In the end, dealing adequately with many of the problems of CIDs will require resources only local and state governments possess. Ironically, this form of organization, which is supposed to reduce dependence on local government, will function most successfully with government support and regulation.

We suggest that government has several roles to play with regard to residential community associations: (1) it should act to ensure that consumer choice is in fact maximized; (2) it should protect the rights of individual owners and residents; and (3) it should protect and enhance the political process within CIDs and try to make the process as open and democratic as possible.

Extensive information and education are needed to create real consumer choice. This means requirements that sellers of both new and resale homes provide prospective buyers with a clear summary statement of the nature of the CID, and the relationship between the individual owner and the homeowners' association. Prospective buyers and renters also need readable summaries of association rules and residents' rights and responsibilities. Buyers also need regular information on the financial and physical condition of the association. The reserve study requirement in California has proven itself a particularly valuable tool, both for informing the membership and for teaching basic management skills to volunteer boards. Such regulations serve the dual function of ensuring adequate information and requiring the basics of good management practices.

Informed consumers do not exist without informed boards. The board of directors is the main source of information for new owners and residents. State registries of CIDs are essential to enable both private and public organizations to reach boards with information. As we have mentioned many, CIDs are not connected to existing professional networks.

We have argued extensively that an individualistic consumer model cannot prepare people adequately to govern a CID. Similarly, the protection of individual rights and enhancement of the democratic process are closely related. Until recently, the primary concern of state law governing CIDs has been protection of individual owners from majority rule, with requirements for super-majorities to raise assessments or change association rules. More recently, California law has recognized that allowing a recalcitrant minority to block board decisions may in fact violate important rights of other individual owners and lead to physical deterioration.

Ultimately, each owner should have the same protections as any American citizen: the right to fair and open procedures and the right to try to persuade one's fellow citizens. Regulations which ensure adequate consumer information also help create informed citizens, capable of participating in governing their association.

Government support is urgently needed to ensure open meetings, full access to records, and fair and free elections in private governments. Cases of electoral fraud or manipulation are relatively rare, but they do occur, and they strike to the heart of owners' recourse against improper or ill-advised actions by the governing board. We believe that some mechanism, such as a petition by 10 percent of the owners, should be able to bring a state observer to oversee elections, or rerun elections in which there is evidence of manipulation.

In addition, the role of the governing board as both prosecutor and judge is a troubling one, which calls for the creation and use of trained third-party arbitrators who are familiar with CIDs.

The exclusion of renters from a role in the government of the CID, combined with the membership of absentee owners, is in violation of long-standing traditions of local democracy. We suggest a split vote, one each for residents and owners, with resident owners thus having two votes. This solution recognizes the extent to which CIDs combine functions of local government and property management.

We argue that this private government needs public assistance, but we make a more radical argument as well. We suggest that the CID is a troubled and overused form of government. As entry-level housing in many areas becomes increasingly restricted to CIDs, government needs to encourage alternatives, such as creative use of small lots and use of public roads and parks to make entry-level housing without common property possible in areas of high land costs.

Further, there is no reason why property management must also be accompanied by such detailed control over people's behavior and property. If CIDs are to be controlled entirely by owners, then let them have the functions of property managers, and cease to act as combinations of police and planning departments. At present, we have people who think they are only property managers being forced to act as political officials, without either the powers or legitimacy of such officials.

For this reason, we suggest that many CIDs be gradually phased out, or their responsibilities be reduced, to make them increasingly flexible. After this is done, the membership can adapt the rules more easily to their current circumstances. In particular, we suggest efforts to reduce the internal rules. Reducing the domain of collective control will result in reduction of the domain of political decisionmaking within the association. In that way, the private model of individual consumer choice will come closer to reality, and more of the political process will be returned to the realm of local government, where we firmly believe it belongs.

Notes

[1] Bernard Crick, *In Defense of Politics* (New York: Penguin Books, 1982.)

[2] Stephen Barton and Carol Silverman, *Common Interest Homeowners' Associations Management Study* (Sacramento: California Department of Real Estate, 1987).

[3] See also "Overcoming Conflicts and Frustration in Running a Community Association" *Common Ground* (September-October 1987).

[4] Stephen Barton, "Property, Community, Democracy: The Beliefs of San Francisco Neighborhood Leaders," Working Paper #462 (Berkeley: University of California, Institute of Urban and Regional Development, 1987); Carol Silverman, "Neighboring: Private Lives and Public Roles," Working Paper #468 (Berkeley: University of California, Institute of Urban and Regional Development, 1987).

[5] The data reported in this section are presented in Barton and Silverman, *Common Interest Homeowner's Associations Management Study*.

Life Cycle of an RCA

Dean J. Miller
Valuation Specialist
Department of Housing and Urban Development
Region IX, San Francisco

Introduction

The concept of home ownership is very strong in American society. According to the Bureau of the Census, in 1986 nearly two-thirds of households lived in homes they owned.[1] However, the increasing cost of land and labor, plus the needed infrastructure of roads, water, sewers, schools, and transportation, have created a relative scarcity of affordable housing. Millions of units of moderately priced new subdivision homes have been eagerly purchased in the past 20 years. Recently, however, there has been a change in the character of that housing. For the first time in our history, a significant proportion of new housing units consist of condominiums, PUDs, and cooperatives, sold at or below the median sales price of detached homes. These communities provide much of the nation's affordable home ownership, affordable second homes, and affordable investment properties.

Many of these communities have residential community associations (RCAs). RCAs are usually created and operated by the developer, but are eventually turned over to the unit owners. The organization is formed through conditions, covenants and restrictions (CC&Rs) attached to the deed to the unit. Owners become members of the RCA automatically when purchasing a unit, and are legally responsible for paying dues and abiding by RCA regulations.The organizations are designed to manage common property, enforce land use and other regulations inside the community, and provide services to residents (e.g., trash collection). Initially, most RCAs are created by developers, who continue to control them through much of the initial sales period. After a substantial percentage of the units is sold, control of the organization is passed to the membership.

RCAs are not new; they were introduced on a massive, unorchestrated basis during the 1970s. The influx of new RCAs exhibited many symptoms of impending failure, threatening the continued success of their communities. This became a major concern for public administrators, social scientists, and con-

cerned citizens. When FHA-insured foreclosures reached alarming rates in some of these pioneer moderately priced communities, it was found that the community association was itself not running well, and was sometimes virtually without leadership and nearly defunct. Because the RCA plays a critical role in the continued success of the community, these failures had the potential to threaten the existence of moderately priced new condominium and PUD developments that needed an RCA to function.

Obvious Problems

In response to threatened failure of RCA communities, the U.S. Department of Housing and Urban Development, Region IX (Arizona, California, Hawaii, Nevada) conducted an initial survey in 1974 to determine what types of conditions were contributing to the RCAs' problems, which problems could be resolved internally and which would require the involvement of governmental agencies, including HUD.[2] This paper reviews the still relevant findings of that study, particularly with regard to the life cycle that RCAs exhibit.

The initial study found the following serious problems plaguing RCAs:

- Undercapitalization (low dues, low reserves);
- Poor construction;
- High foreclosure rate;
- Speculator activity;
- High percentage of subsidized buyers;
- Lack of professional management;
- Adverse rulings by IRS;
- Local police, fire, and refuse service problems;
- Poorly drawn articles of incorporation and bylaws; and
- Loss of market value (for resales).

Even though some RCAs faced one or more of these problems simultaneously, surprisingly few of them failed. Even where problems persisted for a year or longer, eventually most RCAs overcame the adversity. The problems they faced were serious and were solved only with hard work, at great expense and much personal sacrifice. Yet, even when drastic measures are required for survival, enough property owners can usually be found who are motivated enough to make the RCA work. None of the problems cited above commonly appeared to be beyond community solution, even by very small RCAs or those with unsophisticated home buyers. More recent observations of RCAs in California, Arizona, and Hawaii have borne out this conclusion: a few RCAs will fail, but most will survive regardless of the adversity encountered. This suggests that it is important to isolate not only the problems that community associations face but also the factors that contribute to successful handling of those problems.

The Window of Vulnerability

In nearly all cases where an RCA was at its lowest ebb of effectiveness, or near collapse, a pattern seemed to emerge. Problems were not necessarily related to the internal administration of the RCA, but were imposed by external circumstances (e.g., poor construction),with which the RCA at first could not cope. At the same time, as long as the builder-developer remained in control through the initial sales period,serious problems were not evident or difficult to solve. The developer generally handled problems, though not always wisely. Also, RCAs in existence for more than three years seemed to be well established and generally successful. Even when serious problems occurred, these established RCAs were able to function well enough to address them early and with some degree of effectiveness.

Thus, the focus of HUD's observations became the period during which the administrative capability of the RCA appeared to be low. This is the period after the builder-developer leaves, but before RCA members attain the experience and resolve, especially the resolve, to provide for their own welfare. This period of vulnerability could be as short as one or two years or protracted for a period of three or more years, depending on the magnitude of the problems. Of course, the longer it took to pass through this phase, the more seriously affected was the community's viability. The few RCAs that failed usually suffered through a long period of decline.

This leads to the proposition that RCAs pass through phases, and that once through the phases, the RCA's survival was secure. The following growth chronology is extracted from the original report. For the sake of clarity, the most common elements present in each individual development's growth process are organized into three stages.

Growth Chronology

All RCAs studied have gone through the following growth process.[3] This process must be completed quickly and successfully if the viability of the RCA, as well as the housing development, is to be maintained.

Stage 1—**The Honeymoon**: Purchasers are preoccupied with selecting, occupying, and improving units. The developer dominates the RCA and uses his work crews to take care of what little maintenance is required. No substantial repairs or replacements are required. Monthly fees are low and are usually easier to collect than in later stages.

Stage 2—**The Awakening:** The developer turns the organization over to the unit owners. At this point, owners come to realize that they are the RCA. Some of the original buyers begin moving out for various reasons. It becomes increasingly difficult to keep track of owners as units are sold without notification to the RCA. Dues collection begins to falter. Replacement reserves and methods for calculating and predicting costs are found to be inadequate. Latent construction defects surface, but the builders' one year warranty has expired. Subcontractors cannot be located. If construction plans have been provided by the builder, they have often been lost or are found to be inaccurate. Inadequately designed community facility equipment begins to fail, particularly swimming pools and irrigation systems. Monthly fees are found to be inadequate to meet current expenses. RCA directors feel isolated, frustrated, and overworked. Having been left "holding the bag," they either resign, drop out, or refuse to run for additional terms. Residents begin to violate architectural, parking, and pet restrictions (if any). The RCA finds enforcement powers citations are vague or openly challenged. Initial maintenance contractors are found to be unsatisfactory (e.g., landscape installers cannot handle maintenance). Rival factions of homeowners emerge; meetings become pandemonium.

Stage 3—**Coming of Age:** RCA directors come to realize that complaining and avoiding responsibilities are not substitutes for action. Budgets are refined; procedures for projecting increases in reserves and operating costs are developed. Fee increases are agreed to or forced on owners. Collection methods are tightened, declarations of restrictions (also known as CC&R) violations are controlled, and methods for tracking ownership are developed. The adversary relationship with the builder is recognized and negotiations or legal actions are initiated to correct construction defects where necessary and possible. Working relationships are established with local governments. Board members set up buffers, such as a professional management company, or association committee and subcommittee chairpersons, to avoid direct confrontations with other owners. Initial maintenance contractors are critically reviewed and replaced as necessary. The RCA board becomes comfortable with its policy setting and monitoring role, and holding office in the association becomes attractive.

Some RCAs take longer than others to go through these three stages. Indeed, some may not make it to the third stage. The longer the RCA takes to reach that stage, the longer problem resolution is delayed, and the more precarious the development's financial position becomes. For these reasons, it is important that Stage 3 be reached as quickly as possible. Undue delays in necessary fee increases and in accumulating sufficient replacement reserves, or in making required repairs, may make the corrective actions prohibitively expensive. Rather than "catching up" with past deficiencies in fee schedules and management practices, many owners may choose to cut their losses by "getting out," thus setting in motion a chain of events leading to the development's ruin at great cost to its mortgage insurers.

The question is, how do RCAs move from the second to the third stage? The following three sections describe key factors associated with that growth and were supportive of this growth cycle.

Growth Factors

The following factors were observed and analyzed in those RCAs that reached the third stage in the previously mentioned chronology. While no attempts are made to identify these factors as causes or effects of other more underlying causes, it can be said that they developed within the projects studied without any appreciable support or encouragement from any external parties, including government agencies. For example,professional management did not appear to contribute to growth; it was usually employed as a result of reaching stage three and did not contribute to the passage to that stage for any of the developments studied. Not all factors were present in all of the instances studied.

It's Up To Us. The most critical growth or maturity factor was a recognition on the part of the RCA's directors that only they can save and preserve the viability of the development and improve the value of the property. No amount of grousing and complaining about the faults of the builder, FHA, or their fellow owners will change the situation from Stage 2 to Stage 3; no outside force will come to their rescue; vigorous action by the RCA itself is the only possible course of action. Often the RCA's directors reach this position first and then find it necessary to convince their fellow owners that only they can, themselves, save and improve the value of their properties.

Be Tough, Or "Run It Like a Business." Once they have actively assumed responsibility for the development's future, the RCA directors quickly discover that they must sometimes take unpleasant action to collect monthly fees and to enforce the CC&Rs.

A growing number of RCAs whose developments are "blessed" with master water meters have had particular success with shutting off water to owners whose dues are substantially in arrears. This particular tactic need be used only occasionally because word quickly spreads to other recalcitrant owners. Similarly, the RCA need authorize the towing of only a few illegally parked vehicles or call in the public animal control authorities a couple of times to convince owners that it is serious about enforcing the CC&Rs.

The key to developing a "business-like" attitude is a recognition that, unpleasant though they may be, certain actions must be taken or the development will

slide into ruin. RCAs with a business-like approach are increasingly using third parties to execute the policies of the board, such as direct-hire caretakers, and, in some instances, managing agents. Once the proper role of the directors is understood by the other members, the operation runs much more smoothly. Data gathered for this report indicate a strong positive correlation between those RCAs that reported a serious dues-in-arrears problem and those that were reluctant to enforce the CC&Rs. In other words, RCAs that have problems enforcing their CC&Rs also have problems collecting dues.

Think for Yourself

Many RCAs in the second stage of their growth cycle spend much time bemoaning the constraints they perceive as being placed on them by their bylaws, local ordinances, and so forth. Those RCAs that have proceeded to the third stage have come to recognize that these limitations can often be overcome by creative and vigorous RCA action:

1) Proxy procedures can be revised so that those homeowners who are absent from important meetings, and who do not otherwise specify, surrender their vote to "management" (as is the case with normal corporate proxy procedures, but is inexplainably contrary to most RCA procedures);

2) Bylaws can be revised to increase the amount by which dues can be raised without membership votes;

3) Automatic inflationary escalators can be increased;

4) The percentage of owners required to approve certain changes can be reduced; and, perhaps,

(5) The board of directors can recognize that the health of the development sometimes requires that they can and should take actions not popular with the general membership (with the understanding that procedures exist for initiating legal actions against the board and/or removing directors from office).

In the process of learning how to think for themselves and removing artificial bounds to the full use of their authority, some RCA boards have developed creative solutions to commonly recurrent problems. For example, by filing a "blanket lien" against all parcels in the subdivision for possible unpaid fees, the RCA insures that it will be contacted by escrow agents whenever properties are sold. Thus, the RCA recovers some back dues that would otherwise have been lost prior to the filing of a specific lien. More importantly, however, the RCA can, through this technique, keep abreast of changes in ownership in order to keep its billing lists current. While a few RCA boards and officers have taken some "unilateral" actions that have affected their developments negatively, such actions are rare when compared with the much greater number of problems caused by RCA inaction.

The primary characteristics of an RCA that has adopted the requisite"business-like" attitudes are as follows:

- Accurate and forward looking budget processes;
- Monthly fee structures set to support the actual present and future costs of the development;
- Prompt, efficient fee collection;
- Swift, judicious CC&R enforcement;
- Professional, adversarial if necessary, relationships with key participants, especially builders; and
- A normal business hours presence for supervising contractors, dealing with routine problems and complaints, and assisting in relations with owners.

The Patriarch

One of the most important factors in the healthy evolution of RCAs is the presence of leadership among the owners. Every RCA has, by definition, been incorporated and is governed by a board of directors elected by its membership on a formal basis, with limited terms. There is also present in small or medium sized communities, nearly without exception, a single person or small group of persons who exert great influence in the formation of and conduct of daily business for the association. Our observation is that this person has usually been present during the "honeymoon" stage and persevered through the "awakening," but, interestingly, is not always a member of the board of directors. We term this important ex-officio leader, whose term never expires, "the patriarch," who is always a person with much free time, such as a housewife with few children, a retiree, disabled person, and even, rarely, the original developer-resident of the community. If power factions develop among property owners, the patriarch is generally perceived to be on the good side and generally performs a beneficial role in healing rifts. Occasionally, however, a despotic patriarch can be found exerting a strong influence.

The value of the patriarch is that he or she will identify friends and enemies of the community, e.g., builder, IRS, city hall, contractors; is the repository of the history of the development; and knows the best techniques to collect monthly fees and gain cooperation from others concerning community rules (CC&Rs).

The stronger the patriarch, the greater the tendency for other owners to depend on this person to get things done. This overdependence, however,

poses a danger to the viability of the community. Again, most owners can identify the patriarch and consider his or her presence fortuitous. The degree of this individual's direct control over the community varies markedly, but influence is immensely important, even when power is not directly exercised.

However, in larger communities of 200 units or more, the patriarch is more difficult to identify, and he or she may not enjoy longevity through the "coming of age" stage of development. Large RCA size diminishes the patriarch's influence.[4]

Associations with strong patriarchs regressed less, or less far, than communities with weak or diminished patriarchs or none at all. Their presence, therefore, may also help to maintain a state of equilibrium as the "coming of age" stage evolves into maturity.

The Folkmyths of Failure

The original HUD study also found that many of the notions popularly held to explain RCA failures do not appear to be valid. It cannot be denied that if some serious problem such as poor construction or undercapitalization is present, it is like salt in an open wound. That is, the "awakening" takes longer or is more difficult to bear. As it turns out, state and local governments have in the past decade addressed several of these problems. Notably, better incorporations, stricter sales disclosures, defined public services, better environmental and construction standards, and much better designs. In addition, IRS and court rulings are now more "reasonable" toward RCAs, and professional RCA management is more widely available, experienced, and reliable.

Speculator Activity: A Major Problem

A major and notable problem for RCAs today is speculator activity and the negative effect it may have on market values, undermining the attractiveness of principal-residence ownership. Affordability of home ownership, among the basic appeals of "RCA" living, brings with it affordability of property investment (speculation). The value of units for rental purposes, however, is generally at some level below their original sales price.

In cases where developers speculate by building too many units for absorption, the excess units must be sold to gain release from the yoke of supporting the RCA financially. A slow sales pace eats into profits. Eventually, individual speculators are drawn into buying up excess units at a discount or waiting for subsequent mortgage defaults and foreclosures on individual homeowners unable to sell on a flooded resale market. The base value of the community's homes can drop as much as a third from the original sales price as a result of the downwardly spiraling prices. Because it is difficult for appraisers to follow decreases in value, some properties sell to unwary buyers at last week's higher price. These buyers may never be able to sell their property for as much as they paid. A graphic example was found recently in two western sunbelt states where in several moderately priced condominium and PUD projects models sold new at $70,000 and more were being resold as repossessed properties by savings and loans and government agencies for about $40,000. Of course, this has created a buying opportunity for home buyers—sort of a perverse affordability—and many families do purchase them. Most are sold, though, to investors, who hold them as rentals.

Eventually, when the speculators take their profits and manage to sell out, the RCA will have gone through its "awakening" and achieved its "coming of age." The RCA can benefit from foreclosures if the mortgage was insured by a private mortgage insurance company, such as MGIC, GE, TICOR, or by a government mortgage insurance agency such, as HUD/FHA, VA, FNMA, or the California State Housing Finance Agency. All dues in arrears will then be paid and kept current until subsequent resale of the unit. This occurs for the majority of foreclosures in moderately priced residential communities. Thus, the RCA is a beneficiary of the mortgage insurance placed on individual loans.

Professional Management for the RCA? Yes and No

One of the questions that RCAs face in moving to maturity is whether to hire a management company. Management companies are sometimes seen as a panacea by boards of directors emeshed in the second stage of the growth process. Indeed, professional management initially may give the appearance of taking care of some of the RCAs most pressing problems and of doing so without the painful development of a business-like approach on the part of the owners.

Professional management may be used by an RCA for only one service, such as dues collection, or may encompass a whole range of services. This latter case amounts to granting complete control over all RCA affairs, with only the requirement of reporting periodically to the board of directors.

The quality of management services runs from excellent to unacceptably poor. Management can be very expensive on a per capita basis, or reasonable and well worth the money spent. In either case, property management requires oversight. To decide whether to use professional services, three simple questions should be asked: Is it clearly needed? If so, what services are needed? Can the RCA afford the management fee? Can the management firm actually deliver the requisite services?

The employment of a professional management firm is one possible way of developing the characteristics exhibited by the successful business-like RCAs. For some developments professional management is the best or only way to develop these characteristics. For the larger developments (200 or more units), a tough and business-like style capable of handling a

management situation of considerable scope is required and may call for a professional management team. For the medium size developments (75-200 units), an on-site, nonresident, normal business hours presence, with the board handling other responsibilities, is probably the most cost efficient arrangement. The smaller developments probably work best with the RCA running the show directly.

In all cases, however, stage-three characteristics must be developed if the RCA and the development are to be truly successful, and the mere retention of an allegedly professional management firm is no guarantee that these characteristics will be present or even under development.

The RCA faces a number of potential dangers in accepting or requiring professional management as a surrogate for developing business-like characteristics itself. One such danger is that not all management firms produce all requisite services (in fact, few offer a continuous on-site presence). A particularly dangerous situation is created when the RCA enters into a contract with a management firm only to discover, at some later point that vital, "assumed" activities are not part of the service package. Although the existing management agreement is very useful for providing services expected, it leaves sufficient "wiggle room" for those services to be delivered in a fashion other than that envisioned by the RCA.

In addition, the employment of a management firm is not always the most efficient way for the RCA to develop the characteristics listed above. This is especially true for the medium and smaller sized developments. Management firms do not come cheap (especially those who provide the better, more comprehensive services). And management fees do not pay operating expenses or fill replacement reserves. The employment of a management firm and the usually resultant stiff dues increase make good economic sense only if the services are otherwise unavailable and if the increased costs are offset by increased revenues. This is particularly critical in lower income developments where pennies count.

A third potential danger is that RCAs are vulnerable to a false sense of security. Without strong monitoring of the management contractor, a board of directors can be surprised by the results of an audit, a series of homeowner complaints, or a lawsuit.

New Trends: Master and Satellite RCAs

In recent years, developers have built master-planned communities. In them, clusters of RCAs are combined into one "master" RCA, which serves as an umbrella and/or provides centralized control of large recreational facilities or other amenities. Each satellite RCA usually retains its identity and handles most of its own affairs, but supports the master RCA financially and has a representative vote on its board of directors. Generally, the master RCA is dominated for many years by the developer. In one case, this was as much as ten years. During this long "honeymoon" period, the developer subsidizes, guides, and trains the RCA, in order to ensure success of the master-planned community (which may include apartments and commercial and retail development).

The degree of success of these arrangements is not yet known, but initial observations indicate that the relationship between master and satellite is not always harmonious. Disputes arise and can be disruptive to the point of legal action against each other. Such suits are usually over contractual relationships. Also, since each satellite RCA develops its own "personality" and perhaps its own "patriarch," the master RCA is faced with the prospect of uneven overall administration. Recently, a maverick group threatened to gain control of a satellite RCA and "secede" from the master RCA over the issue of "water rights" (use of swimming pools).

Conclusion

Whether an RCA encounters severe problems depends on how well it is launched, its regulatory and economic environment, and the make-up of its constituency. Most RCAs survive and learn to operate efficiently. The environment may or may not change, but it is essential that the RCA change. It must evolve into the "coming of age" stage of existence, if it is to succeed. It must do so whether or not state and local governments desire to facilitate the process. The weight of their numbers (tens of thousands of RCAs) will require increased attention, partly because they can be and are a powerful special interest group when working in concert, and partly because of their role as a partner in community government.

In addressing the demands of RCAs, or their needs, it will be more important to consider means of accelerating their maturation process than to be concerned with preventing failure.

NOTES

[1] In 1986, 63.8 percent of all households lived in homes they owned. U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States, 1988* (Washington: Bureau of the Census, 1987), p. 45.

[2] U.S. Department of Housing and Urban Development, Region IX, *Evaluation Report: Planned Unit Developments, Condominiums, and Homeowner Associations* (San Francisco: Department of Housing and Urban Development, 1974).

[3] The 1974 HUD report was completed under the direction of Senior Analyst Conrad Egan. The author of this paper, Dean J. Miller, served as principal junior analyst on that project.

[4] The patriarchs we met were never paid, but expressed pleasure and pride in their achievements, and said (with a sigh), "Never again."

The Privatization of Local Government: From Zoning to RCAs

Robert H. Nelson
Economist
Office of Program Analysis
U.S. Department of the Interior

The recent issuance of the report of the President's Commission on Privatization reflected a growing interest in the United States in privatization of government activities.[1] Indeed, privatization has had a major impact:

- At the federal level, privatization is illustrated by deregulation efforts and the movement for tax rate reduction and simplification, both of which sought to reduce significantly the degree of control over the private sector and to give market forces greater leeway in determining resource allocation.
- Internationally, privatization has had a significant impact on France, England, Japan, Turkey, and a number of other nations. The most dramatic examples of privatization have been taking place in communist nations such as the Soviet Union and China, where the movement toward use of market forces may represent an event of deep historic significance. All told, privatization has been among the most important worldwide policy developments of recent years.
- Privatization also has been occurring widely at the state and local levels through the contracting out of government functions, and the growing use of residential community associations (RCAs). RCAs represent the privatization of many municipal governing functions. Activities such as the regulation of land and the delivery of local services, traditionally undertaken by local governments, are in some cases accomplished privately in the RCA.

This paper describes some of the economic and intellectual forces that have contributed to the movement toward a wider use of private communities. It then suggests the possible creation of new institutional mechanisms through which the provisions of RCAs could be extended to the private governance of existing neighborhoods that consist now of individu-

ally owned properties. Using the RCA model, the concept would be to establish the private neighborhood as a possible fundamental building block for metropolitan political and economic organization.

Privatization of municipal government functions actually is less of a departure from past practices than may appear on the surface. Despite their formal public status, many small municipalities might better be regarded as having achieved a de facto private status. Seen in this perspective, the RCA is a legitimization and formal acceptance of long-standing trends.

The Privatization of Zoning

The shift of small local communities from public to private status began to occur well before the emergence of RCAs. As a result of an evolution in zoning practices, zoning itself has taken on more and more of the character of a collective private property right.[2] Indeed, zoning has the same basic function as a collective property right—to exclude undesired uses. Under current zoning practices, the small municipality closely resembles a private club, private condominium, or other private collective organization. Zoning provides the property right, local property taxes provide the membership fees, and the city council is the de facto private board of directors.

The evolution of zoning toward a collective property right was not intended by the original architects of zoning and is still not recognized or accepted by many current participants in the zoning system. Zoning was originally said to be an instrument of planning by which the growth of the municipality was to be guided and controlled. However, zoning has proven largely ineffective over the years in shaping future development; most land use plans have gathered dust and have seldom been consulted.

Zoning instead has proven highly effective and has been much applauded as a protective device. As the National Commission on Urban Problems concluded in 1968, "Regulations still do their best job when . . . the objective is to protect established character, and when that established character is uniformly residential."[3]

Through the exercise of zoning powers, residents of attractive suburban and other neighborhoods are able to restrict new entrants to high quality uses similar to existing neighborhood uses. Zoning thereby furthers an economic segregation of neighborhoods similar to the economic differences that arise with respect to the consumption of ordinary private goods and services. Just as the rich drive luxury cars, eat in fancy restaurants and wear expensive clothing, zoning ensures that they will be able to live in especially desirable neighborhoods surrounded by other people of similar means and tastes. The distributional consequences of zoning, in short, are much the same as the distributional consequences of other private property rights, including the private rights of an RCA.

At the level of social theory, the intellectual case for zoning is much the same as the case for property rights in general. Zoning serves a valuable social purpose by establishing the incentive to create attractive neighborhoods and then to maintain them. It does this by ensuring that the builders and maintainers of these neighborhoods will be the ones to reap the benefits.

Abolishing zoning might result not in a wider sharing of attractive community environments but in a loss of many such environments. Although limited to the special domain of land use, zoning poses much the same social trade-off between equity and efficiency that is posed by property rights in general.

If zoning amounts to a de facto collective property right, and thus anticipates the later formal development of RCAs, one might ask why ordinary private property rights of a collective kind, such as an RCA, were not used in the first place. The problem is that most neighborhoods were not built by a single developer and have had diverse owners. Creation of a condominium form of organization in most existing neighborhoods would have required the orchestration of voluntary agreements among all the individual owners—an impossible task in many cases.

Zoning greatly simplified the task by making the coercive powers of government available for this purpose. By imposing zoning, government in effect redistributed property rights within the neighborhood, taking some individual rights and substituting collective rights to protect the neighborhood environment. This compensation made socially acceptable what otherwise might have been considered an illegitimate taking of individual rights.

One key respect in which zoning has differed sharply from a private right has been the inability to sell zoning. The sale of zoning by a municipality would be considered a form of bribery and thus illegal (although hardly a rare event in practice).

In contrast, a private organization selling entry rights would be merely engaging in the sale of a property right, something done all the time.

Even in this respect, there has been some evolution of zoning toward a private right in recent years. Many municipalities are charging high impact and other fees as a condition for allowing entry of new uses, in effect selling the necessary zoning change. The residents of some neighborhoods have gone further, joining together to form collective organizations for the purpose of selling all the property in the neighborhood as a single package.[4] The sale is made contingent on the subsequent approval by the local

city council of a rezoning to a much higher intensity and much higher value use.

In Atlanta, for instance, the residents of one neighborhood of about 140 homes joined together to sell all their neighborhood properties in 1984 for about $32 million. As Harvard law professor Charles Haar commented with respect to such sales, "[we] have finally reached the point where zoning is a form of private property right . . . we have created a collective property right, in the form of zoning."

In the Atlanta situation, the neighborhood decided to "sell its zoning as a right of ownership."[5]

If the explicit sale of neighborhood zoning were to become legally accepted, it would virtually complete the evolution of zoning from an instrument of government regulation and planning to a new collective private property right. With respect to the rights of entry, the RCA would then represent little more than a formalization and legitimization of a private status that many small municipalities had already attained in practice.

There would still be differences in the administration of zoning, as compared with the exercise of RCA property rights, reflecting a much different historical development of these two forms of property rights. However, it would be a mistake to allow the differences to obscure the more fundamental similarities.

The Privatization of Municipal Services

Besides the exercise of zoning controls, the incremental and evolutionary privatization of neighborhoods and municipalities has received a further boost in another important area—the delivery of local government services. Municipalities in recent years have been turning away from direct governmental provision of local services, instead contracting for these services with private suppliers. In adopting this approach, the behavior of small municipalities and of private RCAs has further converged. RCAs obtain many of their community services through the private contracting mechanism.

According to one estimate, total municipal government contracting of basic services amounted to $22 billion in 1972, rose to $65 billion in 1982, and reached $100 billion in 1987.[6] According to a 1987 survey done by the Touche Ross accounting firm, the municipal service most frequently contracted out was solid waste collecti and disposal, followed by vehicle towing and ge, maintenance of buildings and grounds, and istration (legal, accounting, payroll, etc.).[7] The leading reason given by municipalities for contracting out was savings in costs. Higher service quality is also widely cited as a reason for contracting out.

Local governments are also privatizing their physical facilities, looking to the private sector to own and operate properties that serve governmental needs. Of the respondents to the Touche Ross survey, the largest number had privatized roads, bridges, or tunnels (34 percent). This category was followed by street lights and wastewater, sewers or treatment plants (30 percent); solid waste or resource recovery facilities and water mains or treatment facilities (22 percent); and municipal buildings or garages (19 percent). Touche Ross estimated that municipal respondents to its survey would turn over to private ownership nearly $3 billion in additional properties over the next two years.

An RCA represents a further extension of these municipal privatization trends. Instead of privatizing service by service or facility by facility, the RCA serves a community that is in large part private from inception. An RCA is a more systematic and comprehensive privatization, as compared with the piecemeal and incremental privatization occurring in many municipalities.

Private Neighborhoods and Social Values

Privatization is occurring widely in the United States in an attempt to achieve greater efficiency and higher quality in the delivery of local services. But there is another important side to privatization, reflecting a concern that social values have all too often received short shrift in public policies of recent years. As the American welfare state has expanded, it has taken over many areas that were formerly private. One of the consequences has been to diminish the authority of the value-building and supporting institutions of society, which have often had a private status.

The importance of private organizations in asserting community values is not new. In the 19th Century, Alexis de Tocqueville wrote, "Americans of all ages, all stations in life, in all types of disposition are forever forming associations. They are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute."

This tendency to form associations was important, because "if men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads."[8] In the United States, de Tocqueville considered that the private association partly offered a needed corrective to the pervasive leveling influence of American egalitarian and democratic traditions.

In the progressive era spanning the early 1900s, however, there was an assault on the forces of localism and association in American life. The progressives sought to replace the local community with a new sense of loyalty to the national community. As William Schambra writes, progressives

believed a "powerful central government was but the instrument of a far larger project—the creation of a true national community, within which Americans would transcend self-interest altogether and bind themselves to the purposes of the Nation."[9] The national community envisioned by the progressives was bound together by a common commitment to the values of science, rationalism, efficiency, technology and faith in the future progress of mankind.

Today, however, this set of values seems much less likely to form the basis for a united national community. The technocratic and modernist faith of the progressive era is under attack from sources as diverse as contemporary environmentalism, Protestant fundamentalism, and the Catholic Church of Pope John Paul II. Many social thinkers have turned away from the national level to the local level, where a pluralism of values may be found.

Such themes are found, for example, in the writings of Peter Berger and Richard Neuhaus, the former a prominent American student of the sociology of religion and the latter a leading American theologian. Berger and Neuhaus are concerned about the failure of government to support the "mediating structures" in American society. These mediating structures include the church, family, union, and other private institutions that stand between the individual and the state. The failure to offer support is particularly important, according to Berger and Neuhaus, because they "are the value-generating and value-maintaining agencies in society."[10]

Berger and Neuhaus include the neighborhood within this category, arguing that "the neighborhood should be seen as a key mediating structure in the reordering of our national life."[11] The neighborhood offers an opportunity for people of similar backgrounds and values to join together to assert a strong sense of community on a local scale. Berger and Neuhaus write:

> [T]he whole point, however, is the dramatic difference between a nation and a neighborhood. One is citizen of a nation and lays claim to the rights by which that nation is constituted. Within that nation there are numerous associations such as neighborhoods—more or less freely chosen—and membership in those associations is usually related to affinity. This nation is constituted as an exercise in pluralism, as the unum within which myriad plures are sustained.[12]

Similar views are found across a wide spectrum of contemporary American political and social thought. A much enhanced role in society for neighborhoods received an official government blessing from the 1979 report of the National Commission on Neighborhoods. The commission concluded that:

> If city, state, and federal governments are to effectively respond to people's needs, and if the natural resource of every person is to be converted into energy for the common good, then healthy neighborhoods are essential. Neighborhoods are human in scale, and they are immediate in people's experience. Since their scale is manageable, they nurture confidence and a sense of control over the environment. Neighborhoods have built-in "coping mechanisms" in the form of churches, voluntary associations, formal and informal networks. The neighborhood is a place where one's physical surroundings become a focus for community and a sense of belonging.[13]

The commission emphasized that the pluralism of neighborhoods and their ability to deal with issues locally were major assets. Unlike the rigid and inflexible bureaucratic structures commonly encountered at higher levels of government, neighborhoods could address problems from firsthand experience.

> The diversity of neighborhood groups, which may seem to be a weakness, in fact is an important strength. They can respond flexibly, with different organizational structures, across a range of issues from sanitation services to discriminatory insurance rates. Community development organizations and advocacy groups are best suited to certain tasks; neighborhood government can deal better with problems such as juvenile crime with which larger social institutions deal badly, if at all.[14]

The National Commission on Neighborhoods envisioned neighborhood government as the primary mechanism for transferring greater decisionmaking and governing responsibilities to the neighborhood level. However, private neighborhoods might offer still further flexibility, a stronger sense of community, and other advantages envisioned by neighborhood advocates. Indeed, it is possible that the RCA, and not neighborhood government, will prove to be the more important institutional vehicle for implementing a neighborhood movement of the future.

RCAs for Ordinary Neighborhoods

At present, most RCAs are created in circumstances where a builder has created a large project and the RCA is part of the overall development. The rules and procedures of the RCA must be accepted by a new buyer as a condition of purchase.

In an existing neighborhood, the creation of an RCA would require the voluntary agreement of all (or almost all) of the current residents. Inevitably,

this limits the scope for RCAs. The impact of RCAs could be greatly magnified, however, if ways were adopted to make them available to existing neighborhoods.

There are a few examples where residents of neighborhoods have been able to get together to form a new private association voluntarily. As noted above, the residents of a few neighborhoods in Atlanta and other areas have voluntarily banded together in order to sell the entire neighborhood to a developer.

In St. Louis, the residents of many individual streets have formed associations to privatize the street and its surrounding environment. The city literally deeds the street over to the residents, who have to agree to accept the responsibility.

A student of the St. Louis private streets, Oscar Newman, writes that "residents claim that the physical closure of streets and their legal association together act to create social cohesion, stability, and security. The private association provides a legal framework which structures this cohesion, and the physical closure provides an effective tool for allowing residents to control the activities on their street." The private character and the fact of actual ownership seem to have made a great difference. If the street remains publicly owned, even its closing "is unlikely, in itself, to provide the social and legal reinforcement necessary to resist change."

Newman found that "when asked by our interviewers to delimit the boundaries of their neighborhood, residents of private streets almost invariably defined it as congruent with their private street. By contrast, residents on public streets rarely equated the boundary of their neighborhood with that of their street." The overall conclusion was that "public block associations do not provide residents with the same protections as private associations."[15]

The St. Louis and other cases show that the organization of an existing neighborhood of individually owned properties into a collective private association can be accomplished successfully; however, such an assembly remains a rare event.

In order to make assembly efforts more feasible, governments would have to establish new formal procedures whereby the residents of an existing neighborhood could decide jointly whether they wanted to form a private association. A key question would be whether to require a unanimous approval, or merely some super-majority vote (such as 90 percent). A means also would have to be devised to set boundaries within which the residents would vote on whether to form a new private neighborhood. The best approach might be to allow neighborhood residents themselves to propose boundaries, subject to governmental approval.

In considering whether to form a private association, neighborhoods should have a menu of association types from which to select. Some neighborhoods might prefer tight neighborhood controls extending to matters such as the exterior color of each house and the location of plants and shrubbery. Other neighborhoods might take over current zoning controls from the municipality but stop short of controlling the aesthetics of the neighborhood. New private neighborhoods might also differ in their assumption of service responsibilities; some might opt for their own services while others might continue to rely to some significant degree on municipal provision.

The private status of neighborhoods would allow them to enter into the buying and selling of entry rights for new uses. A neighborhood association, for example, might sell off the right of entry into the neighborhood for a new restaurant or gasoline station, perhaps using some of the proceeds to compensate adjacent and significantly affected landowners. The neighborhood might also at some point sell all the neighborhood property lock, stock, and barrel—much as the full assets of a business corporation can be sold from one set of owners to another. Such sales of whole neighborhoods would be most likely to occur near subway stops, highway interchanges, or in other circumstances where the neighborhood land had a much higher value in an entirely new use. Following sale, the existing neighborhood would be vacated and all existing properties replaced by a new type of development.[16]

Allowing the buying and selling of property rights to private neighborhoods would bring the land use decisions of these neighborhoods into the market mechanism. It would create a financial incentive for neighborhoods to offer more sites for new housing development and for the provision of other needed facilities. It would help to solve the problem of a shortage of available land, which has been a major contributing factor in the escalation of housing prices occurring in many metropolitan areas.

Neighborhoods and municipalities have little current incentive to make room for development, as long as there is no financial gain to them. Many municipalities perceive most new development as a prospective fiscal loss. Even though the potential occupants of such development might be willing to pay enough to make it worthwhile to the municipality, no institutional mechanism currently exists for making such payments. The creation of private neighborhoods with saleable rights of entry would create such an institution.

If a practical way could be found to create RCAs for existing neighborhoods, the number and overall impact of RCAs might increase greatly. Indeed, the

RCA might in significant part replace the small municipality as an institution for managing and controlling the immediate surrounding environment.

Privatization and Community

Within the neighborhood, the private status of an RCA may offer a higher quality of life through a more flexible internal regulatory system and a better delivery of local services. Privatization may also offer the prospect of improved efficiency of metropolitan land use by bringing neighborhood entry rights into the market system. Such potential advantages notwithstanding, there is likely to be wide opposition to the systematic privatization of municipal government, based on concerns about the social impacts of privatization.

Privatization has the consequence, as noted above, of segregating the population according to income, social status, social values, and other personal characteristics that define the character of a neighborhood. From one standpoint, this segregation is an asset in terms of enhancing the sense of neighborhood identity and community.

From another perspective, however, privatization may be seen as a detriment, because the broader sense of metropolitan and national community may be eroded. Barriers and social divisions among the residents of a metropolitan area may be raised, rather than lowered.

This trade-off may already have been made. Despite much criticism and complaint, the barriers of zoning exclusion within metropolitan areas have grown higher, rather than lower, over the years. The evidence of past land use and other metropolitan practices suggests that the sense of community is stronger at the neighborhood and municipal level than at the metropolitan level. In the United States, allegiance to community may be strongest at the national level and at the local level, but weaker at the regional and metropolitan level.

Moreover, the social bond provided by even a strong sense of community can be stretched only so far. Within the family and other small social units, there may be no need for private incentives and market mechanisms, because each person performs tasks as determined by internal social rules and understandings.

The larger the social unit, however, the more difficult it becomes to operate in this fashion. A rejection of the market in favor of an attempt to operate in a communal fashion may prove altogether unworkable at some level. Individual behavior may become self-seeking, but occur outside the mechanisms of the market that are specifically designed to channel self-interested behavior to constructive social purposes.

In such circumstances, the market mechanism may offer the instrument for most effectively asserting a wider sense of community. In Europe, for example, the instrument for European unification has not been as much a political community as a community based on common participation in an economic market.

In the same way, a greater reliance on the market mechanism could act to break down suburban barriers that have divided the metropolitan area into isolated political enclaves, yielding a stronger sense of metropolitan community and purpose. Allowing greater leeway for market transactions in land may be the only way that those currently excluded—such as inner city residents—will be able to break through the walls of suburban exclusion.

In short, the privatization of local government and local land use controls may offer the prospect of a further economic unification within the metropolitan area, and a more vigorous sense of community at that level.

Another potential issue is that privatization of local government offers a different set of standards for community behavior. For instance, collective decisionmaking in a private community may allocate voting rights according to the extent of property ownership, rather than the rule of one man, one vote. Renters may also be excluded from voting. Private organizations also are allowed to discriminate among outside citizens in ways that would be precluded in a government entity. A private club, for example, can exclude a person because he or she does not fit the expected social behavior of members. A private residential community could be restricted primarily to elderly residents, a type of discrimination by personal characteristic that would be precluded in a governmental body. All these features may be seen as threatening overall social cohesion and the wider sense of community.

However, Americans also seek a strong sense of local community. It may be that achieving community at this level requires some concessions with respect to the wider sense of community. A vital neighborhood environment may require the means of asserting and maintaining the character of the neighborhood. A greater tolerance for some amount of discrimination may be a price that has to be paid for the goal of achieving a neighborhood with a strong cultural identity and value structure.

There will still be forms of discrimination that are unacceptable in a private context. Over the years governments gradually have expanded the scope of their involvement to limit private behavior in this regard. Racial discrimination, for example, was ruled out in many private circumstances through the civil rights laws of the 1960s. Rules against discrimination according to sex, age, handicapped status, and other

personal categories have also been applied to private entities. In these regards, the distinctions between public and private have eroded in recent years.

Recent trends have included important elements not only of the privatization of government but also of applying new standards to the private sector that might previously have been considered appropriate only for governmental behavior. What seems to be happening is that the old boundaries between public and private are being gradually altered. The evolution of zoning and other local land use practices, for example, has effectively eroded much of the distinction between the small municipality and a large private community.

At the same time, government regulation of private activities has expanded significantly. These developments are not a product of any systematic philosophy or well-defined public policy change. Instead, they are the incremental result of many individual public policy actions, often taken for reasons that, at least on the surface, have little to do with such basic social questions.

However, the RCA may prove to be an important litmus in this process. As a new institution, it is easier to build into the RCA an accurate reflection of current outlooks and views with respect to public and private, and with respect to the relative roles of different levels of community. Changes in older institutions, by contrast, are often limited by a body of precedent and history, requiring that change occur in a slower and less direct fashion.

Conclusion

The growing use of RCAs poses a number of important social questions. How much independence should the local community within each RCA possess to ignore values that the wider community considers to be important? How important is it to encourage strong local communities, and how much would a community suffer from a loss of tight control over entry into the community? By what means should the local community be made accountable to metropolitan and other needs of the wider society? Is the market the best mechanism for this purpose, and in what ways should RCAs be allowed to enter into market transactions?

One of the most complex issues of this kind involves the permissible political arrangements within the RCA. If RCAs are created widely as a substitute for existing municipal government, should they be allowed to determine the rules of their own internal politics—basing voting rights, for example, on property ownership? Or should some of the current expectations for proper municipal behavior be transferred to the RCA, thus requiring, for example, a distribution of voting rights of one vote per eligible individual. Could there be different types of voting rights, varying with the issue under consideration?

Because it is a new institution, the RCA offers unusual room for maneuvering in these regards. Depending on the answers, the RCA has the potential for making some changes of fundamental importance for the political and economic organization of metropolitan areas.

In the world of business, each society has the option of organizing its business activities privately or publicly. Many nations have nationalized their basic industries, although some have reversed this decision in recent years, now more often acting to privatize them. In much the same way, each society has the option of organizing its local residential communities on a public or private basis.

Unlike businesses, the overwhelming choice in the United States historically has been to organize local communities publicly, creating municipal and other local governments; however, the emergence of the RCA creates an important new private alternative.

If RCAs were to become the prevailing mode of social organization for the local community, this development could be as important as the adoption in the United States of the private corporate form of business ownership. We would have two basic collective forms of private property ownership—the condominium (or RCA) form for residential property and the corporate form for business property.

NOTES

[1] U.S. President's Commission on Privatization, *Privatization: Toward More Effective Government* (Washington DC: President's Commission on Privatization, March 1988).

[2] Robert H. Nelson, *Zoning and Property Rights: An Analysis of the American System of Land Use Regulation* (Cambridge, MA: MIT Press, 1977); "Private Neighborhoods: A New Direction for the Neighborhood Movement," in Charles C. Geisler and Frank J. Popper, eds., *Land Reform American Style* (Totowa, NJ: Rowman and Allanheld, 1984).

[3] National Commission on Urban Problems, *Building the American City* (New York: Praeger, 1969), p. 219.

[4] Robert H. Nelson, "Marketable Zoning: A Cure for the Zoning System," *Land Use Law and Zoning Digest* (November 1985).

[5] D. Pendered, "Lake Hearn: The Great Debate," *Atlanta Constitution*, June 20, 1985.

[6] Stephen Moore, "Privatization in America's Cities: Lessons for Washington, Part I," *Heritage Foundation Backgrounder* (May 31, 1988).

[7] Touche Ross, *Privatization in America: An Opinion Survey of City and County Governments on Their Use of Privatization and Their Infrastructure Needs* (Washington, DC: Touche Ross, 1987).

[8] Alexis de Tocqueville, *Democracy in America*, edited by J.P. Mayer (Garden City, NY: Anchor, 1969), pp. 513, 517.

[9] William A Schambra, "From Self-Interest to Social Obligation: Local Communities v. The National Community,"

in Jack A. Meyer, ed., *Meeting Human Needs: Towards a New Public Philosophy* (Washington, DC: American Enterprise Institute, 1982), p. 39.

[10]Peter L. Berger and Richard John Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (Washington, DC: American Enterprise Institute, 1977), p. 6.

[11]Ibid., p. 8.

[12]Ibid., pp. 12-13.

[13]National Commission on Neighborhoods, *People Building Neighborhoods: Final Report to the President and the Congress of the United States* (Washington, DC: National Commission on Neighborhoods, 1979), p. 276.

[14]Ibid., p. 9.

[15]Oscar Newman, *Community of Interest* (Garden City, NY: Anchor, 1980), pp. 126, 153-54, 132-33.

[16]Nelson, "Marketable Zoning."

Private Street Associations in St. Louis County: Subdivisions as Service Providers

Ronald J. Oakerson
Workshop in Politcal Theory and Policy Analysis
Indiana University

Introduction

A large number of St. Louis-area subdivisions function as private street associations, offering an important source of experience with residential community associations (RCAs) as providers of common residential services and neighborhood amenities. Ordinarily, of course, residential streets and street-related services are provided through local governments. The feasibility and desirability of providing common public services through RCAs are becoming increasingly important questions as this type of association grows in number. Private streets in St. Louis date back to the mid-nineteenth century.[1] In 1986, there were at least 427 street-providing private subdivisions in the incorporated portion of St. Louis County, which lies entirely outside the City of St. Louis.[2] Subdivision residents frequently use private streets to restrict access and control neighborhood traffic volume, while paying for and arranging for their own street maintenance, including street-related services such as snow removal and tree trimming.

Subdivisions, although legally private jurisdictions, provide street services in a manner very similar to a municipality in St. Louis County. Ranging in size from a few homes to more than a hundred, each subdivision is governed by a board of trustees elected annually at a meeting of homeowners. The legal basis for the collective organization of a subdivision is a trust indenture attached to each parcel of property. Besides providing for trustees, the indenture obligates each home owner to pay an assessment for the maintenance of common grounds, which often includes streets. Payment of the assessment is treated as a lien on the property, thus providing an eventual, though not necessarily an immediate, enforcement mechanism.

The development of residential streets is quite different from the development of arterial streets. Residential streets can be tied much more closely to housing development, with the basic decisions usually made by the developers. This generalization holds both historically and currently in St. Louis County. Initial decisions bearing on street design and capital investment are private, subject to market

constraints and local government regulations. These development decisions include a choice of subsequent organizational arrangements for obtaining street services. It is the developer who initially attaches trust indentures to subdivision parcels and thereby establishes the subdivision as a legal unit with collective organization. Whether streets are to be public or private is determined in most cases at the developer's discretion.

Various public interests in residential street development are represented indirectly by means of county and municipal subdivision regulations. In order for subdivision streets to be accepted by the county or municipality, construction has to be performed according to public standards. Most standards, including pavement thickness, now apply whether streets are to be private or public. If the streets are to be private, the county requires the developer to provide for a trust indenture and board of trustees. One municipality—there may be others—requires that all subdivision streets be dedicated to the city.

Subdivisions account for a major percentage of street mileage in only 6 of the 91 municipalities in St. Louis County, and they are the dominant type of provider in 2 of them. The total number of subdivisions providing street services in St. Louis City and County is unknown, but 27 municipalities in the county report a total of 427 private street associations, as noted above. Within the incorporated area of the county, the greatest number of subdivisions is concentrated in a geographic cluster of municipalities consisting of University City, Clayton, Ladue, Richmond Heights, Creve Coeur, Olivette, Kirkwood, and Town and Country. Ladue and Olivette are virtually blanketed by street-providing subdivisions: Ladue (pop. 9,349) has 143 subdivisions; Olivette (pop. 7,952) has 90 subdivisions. The City of Town and Country, prior to a recent annexation of additional territory, also consisted almost entirely of private streets in an estimated 90 subdivisions. University City, Clayton, Richmond Heights, Creve Coeur, and Kirkwood mix municipal and private provision, but with greater reliance on municipal provision.[3]

To study street provision by subdivisions in St. Louis County, data on53 subdivisions were collected from a sample drawn from Ladue and Olivette, where private streets are dominant, and from University City and Clayton, where municipal streets are dominant but where a significant portion of the street mileage is in private streets. The data were collected by telephone interviews with subdivision trustees and mail-in questionnaires, in conjunction with a larger study of metropolitan organization and governance in the St. Louis area by the U.S. Advisory Commission on Intergovernmental Relations.[4]

Private Street Maintenance

The subdivisions in the sample are mostly well established, as can be seen in Table 1. Many have been providing residential street services for 30 years or more. The average size subdivision varies from 21 homes in Ladue to 102 homes in Clayton/University City. Most of the subdivisions in the sample have fewer than 100 homes. Although a question on housing type was not included, nearly all of the subdivisions are believed to consist of single-family detached houses.

Table 1
Age and Size of 53 Street-Providing Subdivisions in 4 St. Louis County Municipalities

	Olivette (n = 18)	Ladue (n = 23)	Clayton/ University City (n = 12)
Average Age (years)	31.4	38.3	69.6
Age Range (years)	10-50	1-57	35-83
Average Number of Homes	23	21	102
Range in Number of Homes	4-127	4-100	6-300

The most common street services—indeed the most common services of any kind—provided by the subdivisions are street repair and snow removal. More than 90 percent of the 53 subdivisions surveyed for this study provide these two services. Other street-related services include sweeping, lighting, tree trimming, and mowing. Although only a few subdivisions provide a full range of these services, the average number of different services, among those studied, is almost four per subdivision (including nonstreet services).

As indicated in Table 2, subdivisions make use of their ability to choose a mix of services in accordance with their particular preferences. The result is considerable variation in service bundles across subdivisions. Provision by subdivisions allows for greater variation in service bundles among neighborhoods than provision by overlying municipalities.

Table 2
Percentage of Subdivisions that Provide Various Common Street Services and Other Services

Service	Percent Providing	Number of Respondents
Snow removal	94	53
Street repair	92	49
Sweeping	47	53
Mowing	41	51
Tree trimming	36	53
Street lighting	31	52
Other street services	17	53
Nonstreet services	15	53
Access restriction/traffic control	36	53
Recent capital improvement	57	53

By and large, subdivisions are not supplementary service providers, augmenting service provision by municipalities, but independent providers who either provide for themselves or do without. The only general exceptions are street lighting, which in University City is supplementary to municipal provision, and nonstreet services, such as a security patrol. A few municipalities provide selected services free of charge to subdivisions—snow removal by the cities of Creve Coeur and Webster Groves, and a broader range of services, including minor surface repair, by Kirkwood.

The mean annual subdivision assessment for a group of 39 subdivisions supplying this information is about $130 per household. The reported assessments vary widely, from a low of $25 to a high of $800. All but two cases, however, lie between $25 and $275; the mean assessment computed over this range is about $103. This figure is virtually equal to a mean expenditure on street services of $104 per household computed for 61 municipalities in St. Louis County for which comparable data were available.[5] In a small percentage of cases, subdivision assessments also support nonstreet services, such as trash collection, a private security patrol, or park maintenance. (Total assessments may also vary substantially from year to year because subdivisions occasionally undertake extraordinary projects best understood as capital improvements. These are discussed below.)

Some interesting variation in subdivision assessments occurs among the four municipalities studied: University City (N = 6), Clayton (N = 6), Olivette (N = 18), and Ladue (N = 23). For this portion of the analysis, data for University City (pop. 42,690) and Clayton (pop. 14,306) are collapsed. These cities are more urban than the other two and are similar in socioeconomic composition. Clayton is upper-middle in income. University City is more heterogeneous. Olivette (pop. 7,952), on the other hand, is a rather densely populated but quite suburban, upper-middle income community, and Ladue (pop. 9,369) is a large-lot suburb considered to be one of the wealthiest in the United States.

Subdivisions in Olivette tend to have the lowest assessments by far—averaging $67 per household. Assessments in Ladue are almost twice that amount—averaging $123 per household. Two factors may contribute this to difference: the greater wealth in Ladue and the lower density of population, probably increasing the ratio of street miles to households. The average assessment in University City/Clayton, however, is still higher—$292 per household, although the mean score for this group is driven up by a single subdivision reporting an $800 assessment.[6] The average number of services provided (not counting access restriction) also varies with municipal location. It is highest in University City/Clayton—5.7 out of a possible 9, explaining the high assessments found there, and lowest in Olivette—3.3. Ladue, somewhat surprisingly, has a score of only 3.8. Perhaps the greater number of services provided in University City/Clayton is linked to the more urban character of those communities. Greater wealth in Ladue does not lead to a greater number of services provided, though it may lead to somewhat better street conditions. The state of street repair is reported to be somewhat worse in Olivette, better in University City/Clayton, and better still in Ladue, although the differences reported are not statistically significant.[7]

A difference also exists in service provision equity between subdivisions in Ladue and Olivette, where street-providing subdivisions virtually blanket the city, and those in cities such as University City and Clayton, where street-providing subdivisions cover only a portion of the city. In the latter cases, residents of street-providing subdivisions must pay to support municipal street provision, from which they gain only a partial benefit. The subdivision assessment is paid on top of a municipal tax bill to support residential street provision elsewhere in the city. In order for private streets to be cost effective, the added benefit from subdivision control in University City and Clayton, as compared to municipal control, must be equal to or greater than the entire amount of the subdivision assessment. By contrast, in Ladue and Olivette, virtually all residential street maintenance is private. In this circumstance, the cost effectiveness of private streets requires only that the total benefit gained from services provided be equal to or greater than the subdivision assessment.[8]

A multivariate analysis of the 39 subdivisions for which data on household assessments are available shows that two variables are significantly related to the amount of the household assessment: whether or not the subdivision restricts vehicular access or traffic flow in any way, and the total number of services provided. Access restriction is included here as a proxy for the "urban character" of a subdivision. Together, these two variables measure the demand of residents for services—one somewhat more directly than the other. The age of a subdivision and the number of households, on the other hand, are not significant in this equation. Both of these variables can be used to reflect the cost of supplying services demanded. Subdivision age might be thought to increase the costs of supply, while a greater number of households might decrease the costs of supply per household. These findings indicate that the level of subdivision assessments within this small sample tends to vary with the level of demand for services. Variation in the level of assessments is explained more on the demand side than on the supply side.

The 53 subdivision trustees surveyed were asked to evaluate the condition of their streets. Their responses were coded on a four-point scale: poor, fair, good, excellent. As Table 3 shows, the responses are heavily skewed toward a favorable evaluation. More than 80 percent of the sample appear to be satisfied with the quality of street maintenance they are able to provide.

Table 3
Subdivision Trustees' Evaluation of Street Conditions

Evaluation	Frequency	Percent
Poor	2	3.77
Fair	8	15.09
Good or Average	28	52.83
Excellent	15	28.30
	53	100.00

The subdivisions overwhelmingly tend to be "pure provision" units. Provision of services can be distinguished from the production of services. Provision refers to decisions that aggregate consumer demand and arrange for production, while production refers to the organization of a process that transforms resource inputs into outputs that consist of goods and services.[9] Only a few of the smallest subdivisions produce street repair services for themselves; the vast majority choose instead to contract with either a private firm or the overlying municipality. Those that do "self-produce" tend to do so not by organizing a separate production unit but by pooling their efforts as household "do-it-yourselfers." One large subdivision has a single full-time employee, hired to do snow removal and mowing. Olivette produces both sweeping and snow removal under contract for most of its subdivisions except a few of the larger ones. Clayton produces street sweeping under contract to the eleven private street associations located there.

Reinvestment in Street Infrastructure

The major problem that a street-providing subdivision faces is a need for reconstruction. Sometimes the need for substantial reconstruction or replacement is an occasion for improving the streets to a municipal or county standard and transferring jurisdiction to the overlying municipality or to county government. A number of subdivisions in University City have over the years elected to do just that, at the invitation of the municipal government.[10] Nevertheless, many of the 53 subdivisions studied are willing and able to engage in substantial capital reinvestment. Fifty-six percent of the sample experienced some sort of extraordinary expenditure during the past five years, ranging from $24 per household to more than $2,000 per household. Thirty-nine percent have done major reconstruction during the same period, and 37 percent anticipate future expense of this sort. The average cost of a reinvestment project was just over $650 per household. None of the subdivisions surveyed, however, reported any indebtedness.

Reinvestment, as would be expected, is cyclical. If the subdivisions are sorted by age and cut into four categories, a pattern emerges. For those subdivisions 20 years old or less, only 20 percent (one out of five) report reinvestment expenses. For those between 20 and 40 years old, 82 percent (14 out of 17) report reinvestment. Yet for those between 40 and 60 years old, only 24 percent (4 out of 17) report any reinvestment. After 60 years of age, however, reinvestment activity is again higher, with 62 percent (5 out of 8) reporting such an expense.

Relatively little interest was found among the 53 subdivisions studied for transferring their street jurisdiction to the overlying municipality. A little more than two-thirds of those responding either indicated no interest in such a change or expressed opposition to it. Those recently experiencing higher capital reinvestment costs per household, however, appear somewhat more inclined to want to shed jurisdiction, or at least to entertain the possibility.

Access Restriction

One of the major services provided by subdivisions that control their own streets is access restriction. Throughout much of University City and Clayton, streets that would otherwise provide access to subdivisions from city streets are chained off or barricaded. Residential streets within these subdivisions cannot be conveniently used for through traffic and become restricted to local access use. While not physically denying entrance to vehicle users, the effect is to protect neighborhood streets from potential congestion and high volume traffic. Some subdivisions place speed bumps on their streets. Some also restrict parking. Small municipalities in the county often provide much the same sort of access restriction.

The ability of subdivisions to determine street regulations is, from the perspective of the trustees surveyed, one of their main advantages. An analysis of the 53 subdivisions sampled in this study indicates that trustees in subdivisions restricting access or controlling traffic in other ways are more likely to express a strong preference for retaining ownership and control of their streets.

Oscar Newman, an architect and well-known advocate of "defensible space" as an approach to crime control in residential areas, studied street-providing subdivisions in University City and nearby St. Louis City, comparing "private streets" to "public streets." He found that private streets, with access restricted, had lower crime rates, higher perceptions

of security on the part of residents, higher property values for similar housing, higher assessed valuations, and higher rates of home ownership. Three factors may contribute to these results: (1) street closure, (2) the existence of an association of which all residents are members, and (3) deed covenants that restrict the conversion of property to multifamily use.[11] The research was unable to sort out the effect of one factor from another.

The City of St. Louis has recently instituted an extensive street closure program for the explicit purpose of controlling crime and promoting cooperation among neighbors. This program will offer an opportunity to study the effect of access restriction without formal association and community control through deed covenants. Municipal programs and policies, however, may come and go. When subdivisions own their streets, access control is an attribute of private property that cannot be taken for public use without just compensation. A municipality seeking to compel public access would be required to purchase an easement from the subdivision. Under subdivision ownership, access restriction is a private prerogative that cannot be taken away through public regulation.

Not all municipal subdivisions, however, control access. Comparing across the four municipalities studied for this report, University City and Clayton—the more urbanized areas—report the highest rate of access restriction, 75 percent of the 12 subdivisions in the subsample. By comparison, 35 percent of the subdivisions in Ladue report access restriction, and only 11 percent in Olivette. Officials in Creve Coeur report that only a few of its street-providing subdivisions restrict traffic on their streets. Of course, traffic restriction can also be achieved by means of the street pattern, without any need for closure. Most of the street-providing subdivisions in the City of Town and Country, for example, obtain restricted access through physical design and layout that avoids the grid pattern common in earlier suburban developments.

Ability to Act Collectively

The feasibility of employing RCAs to provide local public services turns in part on the relative ease or difficulty with which the residents of subdivisions are able to act collectively. St. Louis area subdivisions are collective units in the sense that membership in the association and payment of an assessment by homeowners are mandatory. Enforcement arrangements, however, are relatively weak, dependent on the enforcement of a lien against the property. Without substantially voluntary compliance, compelling payment by individual homeowners could entail significant enforcement costs. One indicator of the ease or difficulty of collective action within subdivisions is the degree of difficulty experienced with the collection of assessments.

Subdivision trustees were asked if there were difficulties in collecting the subdivision assessment. A total of 49 responses were coded on a three-point scale: (1) no difficulty, (2) minor difficulty, and (3) significant difficulty. Minor difficulty was defined as a delay in payment. Significant difficulty was indicated by nonpayment or the use of some sort of enforcement action against one or more homeowners. Of those responding, 71.4 percent indicated no difficulty; 12.2 percent, minor difficulty; and 16.3 percent, significant difficulty.

A regression model was used to attempt to explain the degree of enforcement difficulty. Four independent variables were included, two of which are significant. The nonsignificant variables are the age of the subdivision and the amount of the assessment per household. The significant variables are the number of homes in the subdivision and the amount of recent extra assessments to support reinvestment in infrastructure, both of which were positively related to collection difficulty.[12]

Economic theories of collective action suggest that larger groups, ceteris paribus, may experience greater difficulty in acting collectively.[13] Smaller groups are more likely to be able to maintain a sense of reciprocity among group members—a shared sense that each contributes to the collective endeavor with an expectation that others will contribute likewise. Larger groups, on the other hand, are more likely to encounter free-rider strategies on the part of some individuals—an effort to benefit from the contributions of others without having to contribute proportionately. Special assessments are more likely than regular assessments to cause economic hardship for particular households, and thus to create collection difficulties.

None of the subdivisions in the sample report any indebtedness. This finding leads to a conjecture, given the size of extra assessments in some cases, that the subdivisions may have difficulty borrowing money. If this problem could be alleviated, there is a possibility that collection difficulties would also be reduced.

The evidence also indicates that one of the advantages of provision by subdivisions is their relatively small size. Functionally, as street providers, private subdivisions are indistinguishable from municipalities (with respect to homeowners). Participation in collective action is enforceable once a home is acquired within the jurisdiction. Subdivisions are, however, generally much smaller than municipalities. As an arrangement for undertaking collective action, a small subdivision may, therefore, be able to rely on lower cost, consensual mechanisms for collecting revenue to provide public goods. As RCAs

increase in size, any advantage over municipal organization in terms of the relative ease of collective action would tend to disappear, and efforts to rely on consensus as a basis for decisionmaking would become more costly.

Conclusion

Many St. Louis County suburbanites have relied extensively on small private subdivisions to provide streets and street-related services for 40 years or more. Moreover, there is no sign that these arrangements are significantly in decline. To the contrary, homeowners in more than half of the subdivisions studied have recently dug deeply into their pockets in order to finance reinvestment in street infrastructure and to retain residential streets in private ownership. Roughly 80 percent are able to maintain streets in a satisfactory (or better) manner, according to the responding trustees. How this compares to municipal provision is not known.

One of the principal advantages connected with private ownership of residential streets for many, though not all, of the subdivisions is the power to restrict vehicular access. Overlying governmental jurisdictions may preempt such restriction only by purchasing an easement, perhaps using the power of eminent domain. The ability to protect residential communities from traffic congestion in rapidly growing metropolitan areas can be expected to be of increasing value and importance to local residents. Private streets are one way that local residents can preserve neighborhood amenities from erosion by automobiles.[14] Organized subdivisions are small-scale jurisdictions capable of representing neighborhood interests as a way of counteracting larger scale jurisdictions more likely to focus on facilitating traffic flow. Oscar Newman's work comparing private and public streets in residential communities suggests other advantages as well.

Another advantage is an ability to accommodate diversity in preferences among neighborhoods. Preferences for street-related services vary significantly among the subdivisions studied, depending in part on location. Subdivisions in University City, for example, tend to augment their municipally provided street lighting. Subdivisions in Ladue, on the other hand, generally do not provide street lighting, and neither does the municipality, as a matter of preference. In Olivette, the subdivisions are more evenly divided in their decisions to provide street-lighting.[15] More generally, the bundle of street-related services provided by different subdivisions varies from only the basics—street repair and snow removal—to a full range of services.

The experience of St. Louis-area subdivisions with private streets suggests that RCAs are feasible units of provision for local public goods and services when those goods and services generate benefits that flow primarily to the immediate neighborhood. Residential street repair, snow removal, tree trimming, and street lighting are local public services for which the smallest feasible unit of local public provision is very small and geographically definable. Clearly, RCAs are capable of providing services in this context and can offer a number of advantages that their members value highly.

NOTES

[1] David T. Beito, "The Private Places of St. Louis," unpublished manuscript (June 1988).

[2] This figure is based on an incomplete census by the Advisory Commission on Intergovernmental Relations in 1986. See ACIR, *Metropolitan Organization: The St. Louis Case*, M-158 (Washington, DC: U.S. ACIR, September 1988), p. 84.

[3] The number of street-providing subdivisions in the unincorporated portion of the county has not been determined, but county officials say that private streets are less common there. A small number of street-providing subdivisions can also be found in St. Louis City, but the city does not maintain a list or a count. Many of the smaller municipalities in the county originated as subdivisions and are also entirely residential, having little or no state or county street mileage within their boundaries.

[4] See ACIR, *Metropolitan Organization: The St. Louis Case*.

[5] These 61 municipalities record street expenditures separately from other public works in their annual report to the state auditor. See ACIR, *Metropolitan Organization: The St. Louis Case*, Chapter Six.

[6] The differences among the three municipalities are statistically significant in an analysis of variance.

[7] The lack of statistical significance in an analysis of variance indicates that differences among subdivisions within municipalities are too great compared to differences across municipalities to conclude that the municipal location of a subdivision makes a difference in the state of repair.

[8] It should also be noted that subdivision assessments, unlike local property taxes, are not deductible for federal income tax purposes. This increases the relative cost of provision by subdivisions as compared to provision by local governments and is a consideration that applies to all subdivisions wherever located.

[9] See ACIR, *The Organization of Local Public Economies*, A-109 (Washington, DC: U.S. ACIR, December 1987). The distinction is drawn from Vincent Ostrom, Charles M. Tiebout, and Robert Warren, "The Organization of Government in Metropolitan Areas: A Theoretical Inquiry," *American Political Science Review* 55 (December 1961): 831-842.

[10] County government also stands ready to assume responsibility for private streets if improved to standard. One arrangement used for this purpose in the unincorporated county is to create a special road district for the purpose of levying a property tax to finance street improvements as a means of transferring maintenance responsibility to the county.

[11] Oscar Newman, *Community of Interest* (Garden City, New York: Anchor Press/Doubleday, 1980), pp. 124-156.

[12] The better fitting model, including only the two significant variables, has an adjusted R^2 of 0.31, indicating that

31 percent of the variation in the dependent variable is explained. Each independent variable is significant at less than .01. The value of F for the equation is 10.742. N = 44.

[13]See Mancur Olson, *The Logic of Collective Action* (Cambridge, Mass.: Harvard University Press, 1965).

[14]Private streets and accompanying access restrictions also provide a way of maintaining neighborhood amenities that does not involve detailed regulation of homeowners by their neighbors, as is increasingly common in newer RCAs. Access restriction is regulation directed mostly against outsiders, and is therefore less likely to provoke serious internal conflict.

[15]From the sample data, 92 percent of the subdivisions in Clayton/University City provide street lighting, compared to 14 percent in Ladue. In Olivette, the figure is 44 percent.

Seeding Grass Roots Recovery: New Catalysts for Community Associations

Mark Frazier
Chairman and CEO
The Services Group
Arlington, Virginia

This paper reviews the potential for new types of challenge grants by public and private organizations to stimulate formation of covenant-based residential community associations (RCAs). It suggests ways federal, state and local governments, as well as private vendors of essential services, may find it in their financial self-interest to offer inducements for neighborhoods to mobilize threshold levels of membership by property owners and residents, especially in areas afflicted with economic and social distress.

The Problem

Problems of crime and physical deterioration are severe in many neighborhoods. Arson, vandalism, robberies, drug use, and neglect of properties create difficult living conditions for the least advantaged residents, and deter the private sector from creating needed jobs and investments. Unless checked, the problems will create new strains for many cities' economic and tax bases in coming years.

The physical and social collapse of many neighborhoods reflects an absence of powerful self-help mechanisms. Although voluntary block watches and cleanup/fix-up efforts can be exceptionally cost effective, they seldom prove durable over time. Efforts by governmental agencies are more permanent, but they have proven to be expensive, and have done little to generate lasting improvements.

Difficulties in mobilizing financial and in-kind contributions from large numbers of residents over time account for the absence of sustained self-help efforts in blighted neighborhoods. Typically, volunteer efforts to improve conditions in an area fall victim to the "free-rider" problem. Property owners and residents know that they can enjoy the benefits of any improvement efforts that might arise, regardless of whether they shoulder a share of the burden. This fact tends to reduce participation and produce volunteer burnout, discouraging self-help initiatives within neighborhoods.

The Role of Self-Assessing Covenants

Residential community associations have been an effective means of improving neighborhood

Copyright 1988 The Services Group. Printed with permission.

conditions. Through covenants attached to the property title of homes in a neighborhood, all property owners within an area typically agree to share in the support of improved living and working conditions.

Typically, covenants are attached by a residential property developer to deeds of all property sold in a subdivision or condominium. The covenants obligate present and future owners to contribute resources for purposes determined by the association of covenanted property owners, and to observe defined architectural and maintenance standards. Failure by a covenanted property owner to abide by the ground rules can trigger enforcement actions by the association.

To ensure universal payment of membership fees, the association can record notice of any nonpayment with the local recorder of deeds, creating a lien against seriously delinquent owners. Similarly, failure by a property owner to maintain properties adequately can lead to association initiated repairs or remedial measures, with payment secured through a lien, if necessary.

Given the strength of these sanctions, members of property owners' associations seldom choose to withhold annual fees or ignore maintenance and architectural standards. The ensuing success of residential community associations in supporting shared services and maintenance standards has made covenanted properties increasingly desirable to home buyers. During the past 25 years, the number of covenant-backed self-assessing associations (including homeowners' associations and condominiums) in the United States has risen from approximately 600 to more than 90,000.[1] Studies of various residential developments—similar except for their use or lack of covenants—have shown that subdivisions with RCAs are remarkably resistant to traditional cycles of physical and economic decline.[2]

In several neighborhoods confronting physical decay and rising crime, property owners have unilaterally chosen to form residential community associations. Property owners' associations in distressed areas of St. Louis, as noted in Oscar Newman's *Community of Interest*, offer especially instructive examples of success.[3]

Waterman Place in St. Louis is among the most publicized of the spontaneously formed residential community associations. In the early 1970s, this integrated, lower-middle class neighborhood was experiencing rapid growth of crime, drug dealing, prostitution, and deteriorating physical surroundings. Rather than capitulate to what appeared to be an inexorable process of decay, the residents of the neighborhood chose instead to adopt self-assessing covenants, and to request a transfer of ownership of their street from the city to their new association.

The formation of the residential community association and the partial closure of the street set in motion a virtuous cycle. Crime abated sharply, as neighborhood relationships became more closely knitted and as block watches were instituted. The property upkeep and maintenance standards established by covenants assured homeowners that physical blight would not establish a foothold in the block. By borrowing against the future stream of self-assessed fees, the RCA was also able to finance needed street improvements and repairs privately. The market took almost immediate note of these changes. Within 12 months of the RCA's creation, Waterman Place property values doubled from $30,000 to $60,000 for a typical owner-occupied house.[4]

Spontaneous formation of RCAs by property owners has been the exception rather than the rule. The rapid growth of covenant-backed associations during the past 25 years has occurred overwhelmingly in new subdivisions where developers make membership in RCAs an automatic condition of initial purchase.

Although tens of thousands of urban neighborhoods are now in need of strong self-help capabilities, neighborhoods without RCAs have only rarely proven able to mobilize sufficient numbers of property owners in new covenant-backed associations. The virtual certainty of free riders and holdouts tends to prevent property owners in such settings from agreeing to adopt covenants for support of improvement initiatives.

A New Approach to Mobilizing Property Owners

The time may have come, however, to extend the benefits of covenant-backed associations to distressed urban settings, on terms that benefit property owners and tenants alike. A new generation of public and private sector "challenge grants" can motivate residents to overcome the holdout and free rider problems that traditionally have held back sustained community improvement initiatives. In essence, the proposed grants would challenge uncovenanted areas to establish RCAs by offering benefits proportional to the levels of membership they achieve.

Traditionally, providers of challenge grants have required recipients only to demonstrate success in mobilizing ad hoc, one-time matching resources for specific purposes. A conventional donor, for example, might offer matching funds in proportion to the success of a public solicitation campaign by a community organization on behalf of transportation, tutoring, or similar services. Challenge grants seldom have been used to create an infrastructure of lasting self-sufficiency on the part of the recipient.

The new type of challenge grant, by contrast, would catalyze a lasting neighborhood commit-

ment—adoption of self-assessing covenants at a minimum by a majority of the property owners on each block. The self-assessing covenants would oblige members to provide regular financial or in-kind support to neighborhood improvement efforts, rather than the one-time, project-specific counterpart commitments sought by traditional challenge grants. As a means of encouraging widespread participation, the new type of challenge grants could also be linked in size to the percentage of property owners and residents in an area joining a covenant-backed RCA.

Public Sector Challenge Grants

Governmental organizations wishing to implement the new challenge grant approach have a variety of tools at their disposal. These range from introduction of new targeting criteria for existing grants and services to more equitable tax treatment of residential community association members and transfer of public sector-owned real estate to RCAs.[5]

Targeting of Grants and Services

Governmental organizations can provide a powerful stimulus for neighborhoods to form lasting, covenant-backed associations by directing expenditures and infrastructure improvements toward neighborhoods that show most progress in creating RCAs.

Rudimentary precedents for this approach can be found both in the United States and overseas. Baltimore has begun directing some of its grant programs to neighborhoods cooperating with cleanup/fix-up efforts. In Bogota, Colombia, the city government gives priority in urban road construction to low-income areas where residents dig storm drainage channels in advance for the proposed roads.[6]

At the local level in the United States, a policy of favoring newly formed RCAs in distressed areas might pay particular dividends in targeting local block grant funds and in prioritizing neighborhoods for road, curb, and sidewalk maintenance or improvements. Wherever possible, the governmental challenge grants should be of a one-time nature, with a stipulation that the new RCA would henceforth assume responsibility for certain services now provided at taxpayer expense.

Changes in Tax Treatment

Although RCAs have proven their ability to undertake a wide range of municipal functions, including road maintenance, refuse collection, snow removal, street lighting, and emergency services, few governments to date have taken steps to relieve association members of "double payments" problems. Members of RCAs typically pay twice for many local services—once to their associations via self-assessed fees, and again to governments via taxes.

Houston, Texas, and Kansas City, Missouri, are the only major cities where members of RCAs receive rebates from the municipality in acknowledgment of the savings for the public sector generated by association-provided refuse collection services. A policy of offering similar rebates (or tax credits) for a range of basic service functions could be a powerful impetus to RCA formation.[7]

Transfers of Public Sector-Owned Real Estate

In areas characterized by high levels of abandonments and tax-defaulted properties, governmental organizations can establish procedures to expedite sale or long-term lease (at nominal prices) to newly formed residential community associations that mobilize members in crime prevention, cleanup/fix-up, and other sustained improvement initiatives. Effective efforts of these types can add tens or hundreds of thousands of dollars in value to properties that in many cases are perceived today as close to worthless. As neighborhood conditions improve, earnings from the sale or lease of the formerly public properties by the new RCAs could be applied to a range of purposes deemed beneficial to association members.[8]

Private Sector Challenge Grants

Private sector organizations—both for profit and nonprofit—can also offer challenge grants to enlist a threshold percentage of residents in lasting self-help covenants. Significant support for the challenge grant program might prove to be forthcoming from insurance and realty brokers, as well as others with a stake in stimulating neighborhood improvements and increasing property values. In return for receiving the challenge grants, members of the new RCAs would agree to purchase services from participating realtors, insurance companies, and/or banks on a group rate basis. Members of the associations might thereby achieve appreciable savings; condominium associations often save individuals more than $100 a year in homeowners' insurance by purchasing a group or "blanket" policy in lieu of individual policies.[9]

Companies offering challenge grants would benefit in at least two ways by offering inducements for neighborhood recovery. The first would be the net financial gain accruing to insurance providers, realtors, and lending institutions as a result of improvements in neighborhood property values. (In the case of insurance companies, RCAs could also be pivotal in "risk engineering," reducing neighborhood losses from arson, vandalism, and theft.)

In addition, commercial service providers would be able to gain market share at far less cost than achievable through current techniques. By establishing a favored relationship with all homeowners in a

block, a realty firm, for example,might come out far ahead financially. The cost of obtaining an exclusive listing arrangement for properties of association members might be an initial $500 or $1,000 challenge grant to each newly formed RCA, as well as a somewhat reduced commission on members' properties when sold.

In the nonprofit sector, substantial opportunities also exist for adopting the new type of challenge grants. Philanthropic contributions, as noted earlier, are often introduced on a challenge grant or matching grant basis, although without criteria that may lead to financial self-sufficiency. Foundations and corporations active in supporting community development organizations might improve the leveraging of their resources by targeting funds to neighborhoods that mobilize both property owners and residents as members of RCAs.

Safeguarding the Disadvantaged

An apparent paradox confronts any initiative to stimulate creation of RCAs in distressed areas. Although the abilities of RCAs to improve living and working conditions are beyond dispute, such improvements tend to be capitalized into property values. A process of gentrification may occur, thereby depriving the least advantaged residents in an area of affordable homes.

Accordingly, sponsors of an RCA challenge grant strategy should give a particular emphasis to including disadvantaged residents as beneficiaries, rather than victims, of increased neighborhood property values. Rather than make these benefits available as entitlements to low-income tenants, participation in the windfall should itself be offered on a "challenge" basis. A share of the rising real estate values, for example, can be dedicated to those nonproperty owning residents who contribute actively to neighborhood self-renewal efforts.[10] RCAs have several possible mechanisms for offering low-income residents a "piece of the action" in return for their participation in neighborhood self-help efforts. Disadvantaged residents cooperating with crime prevention and cleanup/fix-up efforts might benefit in at least two ways:

1. Taking ownership interests in publicly owned properties in the target area. In Louisville, KY, an innovative means has been adopted for extending a share in property value increases to neighborhood organizations. The city has established the first "Neighborhood Enterprise Association" to be associated with a state-designated enterprise zone.[11] This unique form of revenue-earning neighborhood development organization was authorized to receive unused properties from both the city and state and to develop parcels for business purposes. Thus, low- income residents can benefit financially as crime and blight decline.

2. Sharing in "options." Just prior to the start of a neighborhood challenge grants program, organizations representing the disadvantaged can purchase options on a number of properties in selected neighborhoods with a potential for new business and residential development. As neighborhood property values increase, the value of the options will rise proportionately. Shares in the proceeds from sale of its options could be dedicated to low-income residents who participate in measures enhancing market demand for neighborhood properties. Local banking institutions can also be encouraged to provide assistance and financing for project area developments in exchange for an assured number of accounts from association members.

Once equity interests or their equivalent are established for the benefit of disadvantaged residents, the success of RCAs in raising property values stands to benefit all who demonstrate a commitment to neighborhood improvements.

Implementation Steps

For communities interested in introducing challenge grants, demonstration projects appear to be feasible for stimulating RCAs. The implementation steps for a demonstration project, as summarized below, have been designed to generate support from a spectrum of public and private sector organizations, and to secure real estate options on behalf of disadvantaged residents prior to catalyzing self-help efforts.

Phase I: Organization, Site Selection and Planning

The first phase of the demonstration would entail identifying potential target neighborhoods, conducting background research, structuring the challenge grant offer, and announcing the project. Specific activities within Phase I tasks would include:

Step 1: **Research Background**

- Orient the project team through a review of economic development and planning documents, land use maps, background information on local foundations and corporate giving patterns, and newspaper clippings on neighborhood issues.
- Identify key players in business, government, and nonprofit sectors regarding optimal paths for approach.
- Meet with realtors, insurance companies executives, and bankers to identify areas with takeoff potential, and confer with city officials regarding potential target neighborhoods, distribution of idle city properties,

and conveyance of such properties to neighborhood groups.

Step 2: **Analyze Promising Sites/ Meet with Key Organizations**

- Identify two or three promising neighborhoods, based on review of Step 1 information.
- Conduct detailed neighborhood research (e.g., analysis of economic and demographic trends, interviews with neighborhood businesses and residents on obstacles to neighborhood development, and inventory of size, location and value of city-owned properties).
- Meet informally with key neighborhood activists regarding their activities, sources, levels of funding, plans for the future, interest in acquiring city-owned properties, and terms under which they might assist crime prevention or cleanup/fix-up efforts by property owners.

Step 3: **Structure Challenge Grant Offer**

- Meet with insurers, bankers, realtors, and foundation personnel regarding their receptivity to a challenge grant strategy, and willingness to assist target neighborhoods.
- Review specific challenge grant plans with prospective donors.
- Secure specific commitments from companies/foundations for support of a challenge grant program, both through contribution of resources and through coordination of their existing grant programs to neighborhoods.
- Plan publicity/dissemination strategy for neighborhood property owners, tenants, and the public at large.
- Prepare tools for assisting neighborhood organizations (e.g., model association covenants and bylaws, information kits for neighborhood groups on obtaining unused city-owned properties).

Step 4: **Choose Final Site/Purchase Options**

- Rank "semifinalist" neighborhoods according to their intrinsic take-off potential, likely response to challenge grant offers, and prospects for favorable publicity/visibility.
- Choose implementation vehicle; in consultation with local officials, resolve issues of nonprofit versus for profit, and new versus existing organization.
- Purchase three to five options on residential or commercial properties with rapid appreciation potential in the target neighborhood.
- Approach key neighborhood activists to formalize terms of their commitment/participation in neighborhood improvements.

Step 5: **Announce Program and Site**

- Prepare presentation materials outlining the challenge grant program.
- Arrange public announcement and/or a press conference, inviting key donors and community organization participants.
- Disseminate information on challenge grant availability to property owners in targeted neighborhood.

Phase II: Implementation

Implementation efforts would concentrate on providing technical assistance to neighborhood groups in the demonstration area. Resources for this phase might be obtained from companies and organizations expressing a willingness during the first phase to support implementation efforts.

The implementing organization (determined in Phase I, Step 4) would work directly with groups of property owners and other residents to carry out the legal and administrative tasks necessary to activate the neighborhood improvements. This would include distribution of "how-to" information to people in the neighborhoods about joining a self-assessing association, as well as assistance in organizing workshops and meetings designed to recruit members. The implementation team would pay particular attention to encouraging associations to concentrate on block watch and cleanup/fix-up efforts.

To quantify the fiscal benefits for the city, the implementing organization could also monitor increases in property values and gather evidence of diminished dependency on municipal services. If desired by the project sponsor, local and state governments could also be approached about transferring responsibility for some public services—local transit via minibuses, trash collection, park maintenance, and day care—to resident groups.

In doing so, people in the area would gain working experience and, possibly, reductions in property taxes. This undertaking would demonstrate that block-level services can be carried out by residents themselves (or contracted to private entrepreneurs) with equal or greater efficiency than publicly provided services.

Further implementation activities are possible. The implementing organization might accelerate development of target neighborhoods through incorporation of a profit-making development subsidiary. This corporation could buy additional options on properties with development potential in or near the target areas. Newly formed property owners associa-

tions, as well as cooperating organizations representing interests of the low- income residents, could automatically quality for shares of stock in the development company and increase their equity position by making additional efforts to improve local conditions. The least advantaged residents thus would gain financially by participating in neighborhood cleanup/fix-up and crime prevention initiatives.

As signs of blight and criminal incidents abate, the development subsidiary could actively seek investment by developers in business or residential construction involving parcels owned by the company, as well as the backing of banks and insurers in the process. This option-purchasing enterprise would form a base from which to introduce the "challenge grant" strategy to other high potential neighborhoods in the city.

In sum, using challenge grants to catalyze RCA formation offers hope for stimulating neighborhood improvements beneficial to property owners and residents, and to the surrounding community as a whole. Adoption of the challenge grant approach, in concert with measures to create beneficial interests in property value appreciation for the disadvantaged, should result in significant new investment in the designated areas, increased job opportunities for residents, and an overall improvement in local services and physical conditions.

NOTES

[1] Mark A. Weiss, and John W. Watts, "Community Builders and Community Associations: The Role of Large-Scale Developers in Private Residential Governance," in this volume

[2] _____, *The Homes Association Handbook* (Washington, DC: Urban Land Institute, 1964), Chapters 1-3.

[3] Oscar Newman, *Community of Interest* (New York: Doubleday, 1980), pp. 139-141.

[4] Interviews by author with Williams R. Bosse and Fred Hale, Waterman Place Association, St. Louis, Missouri. For more detailed description, see Mark Frazier and Barry Wax, *Neighborhood Revival* (Washington, DC: Sabre Foundation/HUD, 1983), pp. III-6 through III-8.

[5] Mark Frazier, "Privatizing the City," *Policy Review* (Summer 1980).

[6] Cecilia Sager and Mark Frazier, *Community Self-Help: A New Strategy, Report by Free Zone Authority, Ltd. to the U.S. Agency for International Development/PPC* (April 1984), Chapter II.

[7] Mark Frazier, et al., *Stimulating Community Enterprise: A Response to Fiscal Strains in the Public Sector, Report by the Sabre Foundation/Free Zone Authority, Ltd. to the Joint Economic Committee, U.S. Congress* (December 1984), Chapter IV.

[8] The sensitivity of property values to reduction in crime rates has been documented most systematically in M. M. Li, and J. J. Brown, "Micro-Neighborhood Externalities and Hedonic Housing Prices," *Land Economics*, Vol. 56, No. 2. The concept of transferring public properties to neighborhood enterprise associations was developed by Mark Frazier and Peter J. Ferrara in the *Sourcebook on Enterprise Zones* (Washington, DC: Sabre Foundation, 1980), Chapter V.

[9] Frazier, et al., *Stimulating Community Enterprise*, p. 39.

[10] Ibid, p. 29-30.

[11] Frazier and Ferrara, *Sourcebook on Enterprise Zones*, Appendix on Model State Enterprise Zone legislation. The legislation, prepared by Peter J. Ferrara, subsequently was enacted almost in full by the state of Kentucky and in part by Texas and Indiana.

Condominium and Homeowner Associations: Should They Be Treated Like "Mini-Governments?"

Katharine Rosenberry
Professor of Law
California Western School of Law
San Diego

Introduction

In 1960 there were approximately 1,000 condominium, planned development and stock cooperative projects. In 1984 there were over 80,000 of these common interest communities. Although some communities are small, others, such as Reston, Virginia, are the size of towns. As the number and size of these communities increase, it has become important to determine if the community associations that govern these projects are "mini-governments," controlled by the same constitutional and statutory restrictions that control municipalities.

Constitutional Restrictions – State Action Requirements

The constitutional limitations embodied in the First and Fourteenth Amendments to the U.S. Constitution apply only to government action. These amendments "erect no shield against merely private conduct, however discriminatory or wrongful."[1] Thus, to determine whether the constitution controls the content of the documents that govern these common interest communities or the actions of the community associations that operate them, it is necessary first to determine if state action is present.

Judicial Enforcement Theory

One theory of state action was articulated in *Shelley* v. *Kraemer*,[2] where the U.S. Supreme Court held that state action exists when a court enforces racial restrictions. In this case the petitioners, who were black, wished to buy a parcel of property, and the owners of the property wished to sell to them.

However, the sellers' deed prohibited sale to blacks. Neighbors, who had similar deed restrictions,

---

Copyright 1985 Katharine Rosenberry. Reprinted with the author's permission from *Zoning and Planning Law Report*, October, 1985. For an in-depth discussion of this topic, see Rosenberry, "The Application of the Federal and State Constitutions to Condominiums, Cooperative and Planned Developments" 19 *Real Property Probate and Trust Law Journal*)1984):1; Sproul, "Is California's Mutual Benefit Corporation Law the Appropriate Domicile for Community Associations?" 18 *University of San Francisco Law Review* (1984): 695; Hyatt and Rhoades, "Concepts of Liability in the Development and Administration of Condominium and Homeowners Associations" 12 *Wake Forest Law Review* (1976): 915.

asked the court to enforce the deed restriction and prevent the sale to the petitioners. The court refused to enforce the racial covenant, reasoning that judicial enforcement of the covenant would constitute state action and thereby violate the Fourteenth Amendment's prohibition against racial discrimination.

Common interest communities are governed by a set of covenants, usually called a master deed or declaration. If the holding in *Shelley* is applied to all judicial enforcement of the covenants, then the covenants contained in the governing documents, such as those restricting use, establishing voting rights, and permitting assessment collection, are subject to constitutional scrutiny.

Without analyzing state action, the Florida courts have applied the holding in *Shelley* to judicial enforcement of covenants in common interest projects. In *Franklin* v. *White Egret Condominium, Inc.*,[3] the Florida appellate court determined that an age restriction in a condominium project was unconstitutional. It did not analyze, however, whether state action was present. On appeal the Florida Supreme Court disagreed with the Appellate Court and concluded that an age restriction may be unconstitutional but it, too, merely assumed state action was present, without analyzing the issue.[4]

Not all courts have been so casual in finding state action. Some have implied that the holding in *Shelley* is limited to cases involving racial discrimination.[5] If *Shelley* is limited to the enforcement of racial restrictions, the case has little impact because subsequent Supreme Court decisions and statutes prohibit racial discrimination in housing.[6]

Other courts have restricted *Shelley* to cases in which the state is requiring a private individual to discriminate.[7] Under this theory, if a common interest community has an age restriction and an individual wishes to sell to a couple with children, one could argue that the state could not enforce the covenant because to do so would be forcing an individual to discriminate.

A third group of cases extends the holding in *Shelley* to cases involving covenants that serve a purpose similar to zoning laws. In *West Hill Baptist Church* v. *Abbate*,[8] covenants restricted the use of land to residential and agricultural uses. Two religious organizations wished to build on the property, and the court held that the organizations could do so because the restrictions were unconstitutional. It cited *Shelley* and reasoned that restrictive covenants are like zoning ordinances. It stated: "If a zoning ordinance is, in its operation, unconstitutional, a restrictive covenant in the same area having the same effect would likewise be unconstitutional because the court's enforcement of the restriction would constitute state action."[9] Under this theory, covenants such as those restricting use to residential purposes, restricting "For Sale" signs, prohibiting solicitation, and providing for architectural review would be subject to constitutional scrutiny.

While some cases do extend *Shelley* to situations involving use restrictions, it should be noted that there are very few that do so. Further, some cases reject the theory that private use restrictions and zoning laws should be judged by the same standard. In *Church of Christ* v. *Metropolitan Board of Zoning Appeals*,[10] a church attempted to locate in a neighborhood that was zoned residential. While the court concluded that a town cannot zone to exclude churches, it stated that the way to exclude churches legally is to do so by "private mutual covenants between property owners."[11]

"Sufficiently Close Nexus"/"Symbiotic Relationship" Theory

A second theory of state action is a combination of two theories called the "sufficiently close nexus" and "symbiotic relationship" theories. State action has been found when there is a sufficiently close nexus between the state involvement and the challenged private conduct to enable a court to conclude that the private conduct can be attributed to the state.[12] It has also been found when the state has so insinuated itself into a position of interdependence with a private party that the state can be considered a joint participant in the challenged behavior.[13]

State involvement exists in both the creation and operation of common interest communities. First, the condominium form of ownership is generally created by state statute. In addition, many states control the governance of condominium projects. In California, for example, statutes and the Department of Real Estate Regulations control, among other things, the contents of the governing documents, assessments, transfer of common areas, amendments to governing documents, meeting times and places, voting rights, the election of the governing body, and budgeting.[14] The State of California also controls the development and sale of common interest communities.[15]

It is unlikely, however, that even this extensive state involvement constitutes state action. In *Rendell-Baker* v. *Kohn*,[16] the Supreme Court refused to find that a private school was acting under color of law, even though students were referred to the school by the Department of Public Health, the school was regulated pursuant to state standards and it was supported, in part, by federal funds. The Supreme Court also refused to find state action in *Blum* v. *Yaretsky*,[17] where a private hospital was funded, in part, by the state and was regulated extensively by the state. The court concluded: "[A] State normally can

be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[18] Thus, ordinarily there is not sufficient state involvement in a common interest community or a sufficiently close nexus between the state and the association to find state action using this theory.

Under some conditions, however, a court may find state action under this theory. For example, state action may be found if the state enacts a statute directly affecting common interest communities. In *Surfside 84 Condominium Council of Unit Owners* v. *Mullen*, the Maryland appellate court, in an unreported 1984 decision, found state action in the enforcement of condominium lien laws because the state created, regulated, and enforced the liens.

State action may also be found if a common interest community is built as part of a redevelopment project. In *Smith* v. *Holiday Inn*,[19] where the Holiday Inn was accused of racial discrimination, the Court of Appeals found state action, even though the alleged discrimination occurred on private property, because the hotel was part of a government redevelopment project.

Further, some local governments are demanding to play a larger role in the creation and operation of common interest communities. For example, in California the Rancho Marietta Community Services District, a quasi-legislative body, has the power to take over the enforcement of the governing documents of common interest communities and to act as the architectural review body of these communities.[20] It has also been suggested in California that local governments or state agencies draft the governing documents for common interest communities. If the government controls the contents of the governing documents and acts as the governing body, a court may well find state action.

Public Function Theory

The final theory of state action is the "public function" theory articulated by the Supreme Court in *Marsh* v. *Alabama*.[21] In *Marsh*, a Jehovah's Witness was prohibited from distributing religious literature in Chickasaw, Alabama, a town owned by Gulf Shipbuilding Corporation. The court concluded that state action existed, even though Chickasaw was private property, because Chickasaw "had all the characteristics of any other American town."[22] The property had residential buildings, commercial establishments, a post office, a sewage disposal plant, a system of sewers, roads and sidewalks, and police protection paid for by the property owner. Because Chickasaw did "not function differently from any other town,"[23] the court held that First and Fourteenth Amendment guarantees extended onto the private property of this company town.

In order to determine if this theory applies to a common interest community, it is necessary to determine if the project is the "functional equivalent" of a municipality. There are several similarities between community associations and municipal governments. The association's power to assess homeowners is similar to a municipality's power to tax. The association's power to control the use and facade of buildings through covenants and architectural review is similar to a municipality's zoning power. Both can be responsible for services such as road maintenance, street lighting, parks, recreation and utilities. Both are responsible for planning and budgeting, and both are run by elected officials. Finally, both may penalize those whose behavior deviates from the governing documents.

These similarities may not, however, be sufficient to constitute state action. In *Hudgens* v. *National Labor Relations Board*[24] the Supreme Court, relying on *Lloyd* v. *Tanner*,[25] and Justice Black's dissent in *Amalgamated Food Employees Union* v. *Logan Valley*,[26] held that a shopping center was not the functional equivalent of a town because it did not have residential buildings, sewage disposal plants, or "even a post office."[27] Similarly, in *Illinois Migrant Council* v. *Campbell Soup*,[28] even though a migrant farm had residential structures, a recreation structure, a store, and limited police protection, the court held that it was not the functional equivalent of a town because the farm did not have a "drug store, dry goods store, clothing store, bank, school, office or medical facility."[29]

Applying these criteria, most common interest communities are not the functional equivalent of a town. But some are. In the late 1960s and 1970s, increased attention was given to the "new town" movement. Private developers purchased large tracts of land and created planned developments which contain all the amenities of traditional towns. The main difference between these planned developments and traditional towns is that the planned developments are privately owned and governed by a community association rather than a municipal government. An example of one of these large private developments is Reston, Virginia.

Reston is built on 74,000 acres. In 1982 it had a population of about 35,000 and will have a population of about 67,000 when it is fully developed. It contained about 12,500 residential units and 500 businesses, professional firms, and associations. It also had 21 churches, four shopping centers, a medical clinic, 13 financial institutions, eight public schools, two libraries, two post offices, a police and fire substation, a sewage treatment plant, a bus system, a network of roads, and many recreational

facilities.[30] Reston is the functional equivalent of a municipality and is likely to be subject to the same constitutional restrictions as a municipality.

Even if a court concludes that a common interest community is not sufficiently like a town for state action to exist under the U.S. Constitution, the court may nevertheless conclude it is sufficiently similar for purposes of applying a state constitution. In *Laguna Publishing Co.* v. *Golden Rain*,[31] the publisher of a "give-away" newspaper alleged that its rights of free speech and free press, under both the federal and California constitutions, were violated when the publisher was denied permission to distribute its newspaper inside a residential planned development. The planned development consisted of dwelling units, some recreation areas, and streets. All the property in the planned development was privately owned, and entry to the property was restricted.

A California appellate court concluded that the planned development was not the functional equivalent of a town pursuant to the holding in *Marsh*,[32] because it did not contain "retail business or commercial establishments."[33] Therefore, the U.S. Constitution did not apply. However, it also concluded the development was sufficiently like a town for the California Constitution to apply, and that the defendant's discriminatory exclusion of the plaintiff's newspapers violated the plaintiff's right to free speech and press guaranteed by the California Constitution.

Consequences of Applying the Constitution

Because a court could find that the constitution applies to the governing documents of a common interest development and to the actions of the community association, using one of the above theories, it is important to identify some of the consequences of such a finding. First, if the constitution applies to the governing documents, each covenant contained in those documents will be subject to constitutional scrutiny.

For example, governing documents in common interest communities routinely contain a provision which states that each unit has one vote in the association. In addition, some permit the developers' votes to be weighted while they are in control of the project. Both schemes may violate the principle of "one person, one vote" enunciated in *Reynolds* v. *Sims*,[34] particularly since the voting schemes would be subject to the strict scrutiny test. Imagine a state statute or local ordinance that permits one vote per house rather than one vote per eligible resident. Or imagine a statute that grants each developer in a town three votes.

Age restrictive covenants also exist in many projects. As mentioned, the Florida Supreme Court has found these to be constitutional. But the federal district court in *Halet* v. *Wend Investment Co.*,[35] implied that an age restriction may be an invasion of privacy. If age restrictions are held to be unconstitutional, the board members who have enforced these restrictions, even if they did so under advice of counsel, could be held individually liable pursuant to the holding in *Tillman* v. *Wheaten-Haven Recreational Association, Inc.*[36]

In *Tillman*, the board members of a private recreation club discriminated against blacks after being told by their counsel that private discrimination did not violate a federal statute.[37] The Supreme Court held in a previous case involving the same facts that because the private club gave preference to those applying for membership from a particular geographic area, private discrimination did violate a federal statute.[38] In the second *Tillman* case, the Fourth Circuit held that the board members who engaged in such discrimination were individually liable and potentially liable for punitive damages, even though they were told by their attorney that such discrimination was legal.

A person who purchases a unit in a common interest community automatically becomes a member of the community association. Thus, membership in these projects is even more directly linked to property ownership than it was in *Tillman*. Arguably, therefore, if age restrictions are unconstitutional, board members who have enforced these age restrictive covenants could be individually liable for engaging in behavior prohibited by the Constitution.

Most documents contain covenants permitting the collection of both monthly assessments to cover maintenance and special assessments to cover the expense of capital improvements or special projects. In some communities these assessments are substantial, guaranteeing that only the wealthy will reside in the community. This type of covenant could arguably be subject to the same exclusionary zoning arguments that would exist if a town only permitted high income housing. Some developers in New Jersey have already recognized this potential problem and are providing a two-tiered assessment scheme in their common interest projects to accommodate low and moderate income families.

Some documents restrict "For Sale" signs. This provision may be unconstitutional pursuant to the holding in *Linmark Associates, Inc.* v. *Willingboro*,[39] where the Supreme Court held that a local ordinance prohibiting "For Sale" signs violated the First Amendment.

Covenants restricting the general public's right to enter the project may violate freedom of religion. As discussed, the court in *Marsh* v. *Alabama* held that the Jehovah's Witnesses could not be excluded from a company town because the town was the functional equivalent of a municipality and the restriction of

entry violated the Jehovah's Witnesses' freedom of religion, guaranteed by the First Amendment. Covenants that authorize the association to possess a passkey to each unit and covenants restricting use to single family residences may constitute an invasion of privacy.[40] Covenants that permit an association to prohibit leasing may violate the due process clause of the Fourteenth Amendment and may subject the association to damages for inverse condemnation.

These are just a few examples of the problems encountered in applying the Constitution to common interest communities. At least two additional issues arise. First, in order to determine whether a particular covenant or association action is constitutional, a court would have to weigh the public interest against the private interest involved.

Who is the "public?" Is the "public" the residents of the city or state? Is it the residents of the development? This issue will be important because it may be in the best interests of the residents of the development to deny entrance to all but invited guests, but it may not be in the best interests of the greater public if, for instance, such action denies freedom of religion.

In addition, the court would have to address the issue of consent. When people move into a common interest community, they are agreeing voluntarily to be bound by its covenants. A court would have to determine the extent to which an individual may waive his or her constitutional rights.

These examples demonstrate that the consequences of applying constitutional doctrine to common interest communities are far-reaching and troublesome. Thus, while a court may be able to find state action using one of the above theories, it should be reluctant to do so.

Statutory Restrictions

Even if a court does not find state action, it may still conclude that a community association is sufficiently similar to a municipality that it should be governed by statutes applying to municipalities. For example, although a California appellate court in *Cohen* v. *Kite Hill Community Association*[41] did not discuss the Constitution, it did conclude that a community association was like a local government, and that when the community association permitted a fence to be built, it was similar to a municipality granting a variance.

This case raises some unresolved questions. In California a local government has to prepare findings of fact to support its decision to grant a variance. One wonders if an association action is invalid if there are no findings of fact. A local government also has to hold a hearing and must notify adjoining property owners of the hearing. Again one wonders if the community association must conform to the same standard.

A common interest community could also be restricted by other statutes. For example, if a state statute limits the type of use and building ordinances a town may enact, developers drafting documents for common interest communities may be similarly restricted in the type of covenants that they may draft.

If the association is treated like a government, it may also be subject to the federal antitrust statutes. For example, if the association restricts the uses in the project to residential uses, it potentially may have violated the antitrust statutes the way a municipality might if it made a similar decision.

These examples are merely a sampling of the types of statutes that may govern community association behavior, if the common interest community is considered to be similar to a municipality. These examples illustrate again the danger of a court casually assuming the community association should be treated like a local government.

Conclusion

Because the law affecting common interest communities is still developing, the extent to which courts will treat community associations as "mini-governments" is unclear at this time. However, considering the dramatic increase in the number of common interest communities, it is clear that the courts' resolution of this issue will affect a significant portion of our population.

NOTES

[1] Shelley v. Kraemer, 334 U.S. 1, 13 (1984).

[2] Ibid.

[3] Franklin v. White Egret Condominium, Inc., 358 So. 2d 1084 (Fl. App. 1977).

[4] White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346 (Fl. 1980).

[5] SMI Industries,Inc. v. Lanard & Axilbund, Inc., 481 F. Supp. 459, 462-63 (E.D. PA 1979); Stephanus v. Anderson, 26 WA App., 326, 613 P.2d 533, 540-41 (1980).

[6] Jones v. Alfred Mayer Co., 392 U.S. 409 (1968).

[7] Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[8] West Hill Baptist Church v. Abbate, 24 OH Misc. 66, 261 N.E.2d 196 (1969).

[9] Ibid., p. 200.

[10] Church of Christ v. Metropolitan Board of Zoning Appeals, 371 N.E.2d 1331 (Ind. App. 1978).

[11] Ibid., p. 1334.

[12] Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[13] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[14] California Civil Code, sec. 1350 et seq. (West); California Administrative Code, tit. 10, sec. 2792 et seq. (1985).

[15] California Business and Professional Code, sec. 11000-11030 (West); California Government Code, sec. 66410-499.31 (West).

[16]Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

[17]Blum v. Yaretsky, 457 U.S. 991 (1982).

[18]Ibid., p. 1003.

[19]Smith v. Holiday Inn, 336 F.2d 630 (6th Cir. 1964).

[20]California Government Code, sec. 61601.13 (West).

[21]Marsh v. Alabama, 326 U.S. 501 (1946).

[22]Ibid., p. 502.

[23]Ibid., pp. 506-508.

[24]Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976).

[25]Lloyd v. Tanner, 407 U.S. 551 (1972).

[26]Amalgamated Food Employees Union v. Logan Valley, 391 U.S. 308, 327 (1968).

[27]Ibid., 424 U.S. 516.

[28]Illinois Migrant Council v. Campbell Soup, 574 F.2d 374 (7th Cir. 1978).

[29]Ibid., p. 378.

[30]Reston Land Corporation, *Reston Facts and Figures* (June 1982).

[31]Laguna Publishing Co. v. Golden Rain, 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982).

[32]See Marsh v. Alabama.

[33]Laguna Publishing Co. v. Golden Rain, 182 Cal. Rptr. 825.

[34]Reynolds v. Sims, 377 U.S. 533 (1964).

[35]Halet v. Wend Investment Co., 672 F.2d 1305 (9th Cir. 1982).

[36]Tillman v. Wheaten-Haven Recreational Association, Inc., 517 F.2d 1141 (4th Cir. 1975).

[37]42 USC sec. 1982.

[38]431 U.S. 85 (1977).

[39]Linmark Associates, Inc. v. Willingboro, 326 U.S. 501 (1946).

[40]Welsch v. Goswick, 130 Cal. App. 3d 398, 181 Cal Rptr. 703 (1982).

[41]Cohen v. Kite Hill Community Association, 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (1983).

Residential Community Associations and Land Use Controls

A. Dan Tarlock
Professor of Law
Chicago Kent College of Law
Illinois Institute of Technology
Chicago

The Problem of Public and Private Land Use Governance

This paper examines the land use control issues raised by the proliferation of residential and other developments governed by residential community associations (RCAs). Two sets of land use issues are examined. The first is the control of internal development and use, and the second is the relationship between the RCA development and the local political community.

These two issues historically have been treated as separate because the two systems of land use control have been viewed as parallel. Private land use controls preceded public land use controls such as zoning. In the 1920s, zoning was promoted as a superior form of land use control, and private controls were expected to wither away. Developers continued to use private controls in exclusive developments, and there is a long history of residential community associations.[1] But private controls and RCAs were not democratized until after World War II. Market conditions in many areas fuel the use of RCAs, and units of local government may have a greater interest in private land use controls than they previously assumed.

RCAs are private communities within public communities. They play an increasingly important role in the control of land use, as more and more people purchase residential dwelling units in developments that offer common area amenities and de jure and de facto tenant or owner screening over neighbors.[2]

In theory, the community created by the association offers the resident the psychological and financial advantages of what has been described as a common interest community. An RCA manages and maintains the common areas and enforces private land use restrictions that enhance the overall quality of the development. This necessitates land use regulation and revenue raising by the residential community association. The decision to purchase a

dwelling unit in an RCA may be involuntary, as in the case of a high rise condominium, or voluntary.

Historically, the choice to live in two communities simultaneously was voluntary because "common interest communities" were developed for upper income buyers.[3] There are still many such communities, but in major urban and resort communities the costs of land and services force home buyers to purchase townhouse and medium or high rise units instead of single family detached homes.[4] This market-driven trend has important implications both for the internal governance of RCAs and for relations between RCAs and the public governments in which the RCA is located.

The proliferation of RCAs has led to the creation of associations without the community or managerial support to perform as many expected.[5] In turn this has led people to question the historic assumptions that underlay the difference between RCAs and public governments: an RCA resident expressly purchases quality control that is generally unavailable in the public sector. In return, RCA members subject themselves to control without the checks that must accompany the exercise of public power. These assumptions have held as long as RCAs served a limited market and the maintenance and regulatory functions were modest, but as RCAs serve broader markets the scope of their regulatory powers over land use has increased, as has member unease over the private government in which they find themselves.

A person who purchases a dwelling unit in a development with an RCA becomes a citizen of two types of government. The first is public. It consists of the various political jurisdictions (city, county, and special districts) with regulatory jurisdiction and taxing power over the development. The second is private. A residential community association is technically a private contractual arrangement among the members, but it functions as a de facto government.

Traditionally, American law has drawn a distinction between public and private associations to decide how power should be allocated between the state and individual. The constitutional and other doctrines that courts enforce to protect individuals from the abuse of state power were not thought necessary to protect individuals who consented voluntarily to a private association.

RCAs strain this distinction. As one writer observes, "The creation of the association through the declaration and other documents must be viewed much like the drafting of a constitution."[6] Still, the public-private distinction remains fundamental to understanding RCAs.

The distinction flows from the legal structure of an RCA, although one must be careful to distinguish among the different forms of associations. RCAs use existing business forms of association to hold and exercise common law servitudes. Homeowner associations are generally nonprofit, nonstock corporations that hold title to common property. Each member has an interest in the property that entitles him or her to participate in the governance of the association,[7] which is managed by a board of directors elected by the unit owners.[8] The servitudes that they hold and enforce are generally easements, equitable servitudes, and real covenants.[9] Through these servitudes, the RCA can control the development and use of land and raise money to maintain the common facilities. The enforcement of real covenants that impose financial obligations is often supported by the imposition of liens on the property of owners who do not pay their assessments.[10]

Traditionally, public units of local government have not asserted an interest in the internal governance of a RCA, and RCAs have not been perceived as a distinct public land use problem. The prevailing assumption seems to be that RCAs and units of local government are parallel institutions with little interrelationship. To the extent that a relationship exists, the law generally assumes that: (1) RCA controls are compatible with public controls, and (2) local governments' interest is primarily limited to siting the RCA; thus, (3) these governments have no interest in the resolution of the conflicts between the RCAs and their members about the legitimacy of private restrictions objected to by the residents.

RCA law concerns almost exclusively the relationship between an RCA and its members. RCA regulation has come from higher levels of government. Federal and state antidiscrimination laws control tenant selection for some purposes. As internal conflicts have become more widespread, state legislatures have intervened in the name of consumer protection. State legislation governs issues such as RCA and member tort liability,[11] association self-dealing, and the required disclosure of the RCA structure and powers.[12]

The increasing regulatory role of RCAs raises the issue of the compatibility of their regulation of land use with the traditional land use goals of the units of local government with jurisdiction over the development controlled by the RCA. There is no a priori reason to presume incompatibility. The most plausible thesis, which follows from the public choice approach developed below, is that RCAs impose regulations beyond those imposed by the local communities. These regulations complement the land use policies of the local units of government and maximize the preferences of the owners of residential units in the development.

Basically, RCAs impose detailed aesthetic land use and lifestyle regulations. These regulations are

often more intrusive on individual choice than public regulations, although the distinction between public and private restrictions collapses in many suburban communities. RCA regulations generally "upgrade" the community. However, there may be instances where there is a conflict between the policies of an RCA and those of a community, and these instances may increase in the future.

For example, RCAs usually have common open space, but this open space may not be available for use by non-RCA citizens of the community, thus creating a conflict between the RCA and the community's land use policies.[13] RCA members have sued developers who dedicated common areas to general community use,[14] for example. Also, a local government may rely on a certain level of covenant enforcement in approving an RCA development. The association may be lax, however, in enforcing the scheme, so the community may end up with a less fiscally valuable development than it expected.

To analyze the question of whether RCA land use control is compatible or incompatible with units of local government, it is useful to conceptualize the multiple relationships between the association and its members and the political community that arise from the existence of a community within a community.

The four relevant relationships that must be analyzed are: (1) the relationship between the development, governed by the original developer or an RCA, and the political jurisdiction or jurisdictions in which the RCA is located; (2) the relationship between the members of the RCA and the representative body that imposes and enforces the association's regulations; (3) the relationship between the members of the RCA and the local political jurisdictions of which they are citizens; and (4) the relationship between the members of the association and the developer.

For example, this last relationship is an important consumer protection issue for early purchasers in the development, but it is also important for the political community because it relates to the power of a community to enforce its land use regulations against a sequential development.[15] Developers have a tendency to "front end" higher density, profit generating uses and to defer common area amenities until the later phases of a project.

The Competing Interests

This section analyzes the interests of the four relevant players against each other: (1) RCAs, (2) the initial developer, (3) RCA members, and (4) public units of local government. The next sections analyze possible conflicts between the policies of the RCA and units of local government. Both internal and external RCA conflicts and the possible interrelationships between these conflicts are explored.

Developers and RCAs

Developers and RCAs may have inconsistent interests. These conflicts may affect the quality of the development to the detriment of both the RCA members and the unit of local government. The possible conflict of interest between RCAs and developers stems from the fact that larger planned developments occur in two phases, development and post-development. During the first phase, the developer still has an interest in the project because he has not completed it and taken his profit. Thus, voting power is generally shared, sometimes unequally, between the developer and residents. This can give the developer the power to modify the original development. In the post-development phase, the developer has often cashed out and transferred full power to the RCA.

RCA Members and the RCA

RCA members and the RCA might be said to have identical interests, but experience indicates that this is not so. RCAs possess powers similar to those of public local governments, such as the power to regulate and the power to tax. Although the powers of the RCAs are less extensive compared to a city or county, they can intrude deeply on individual choice and thus are resisted.

The problem here is the inevitable Burkian tension between the interests of the representative body and the citizens. The interests of the representative body are generally more long run and quality oriented, while those of the citizens are more immediate and self-interested. That is so especially when it comes to assessments and certain types of behavior and lifestyle regulations. For example, among the issues that have been addressed in covenants: the volume of music, what activities can take place in a social room, the storage of property, the use of patio furniture and barbecues, the frequency of toilet flushing, and the kind of soap used in dishwashers.

The RCA and the Unit of Local Government

As a general matter, the relationship between an RCA and a city is that of a citizen. The RCA is a collective means of asserting the citizen concerns of its members. These include the provision of government services, the allocation of revenue, and the control of land use. RCAs frequently intervene in zoning proceedings and seek judicial review of them to protect the RCA from surrounding land uses.[16]

Public Units of Local Government

Public units of local government generally regulate land use to prevent spillovers among

incompatible land uses. This interest is reflected in two types of regulations. Units of local government exercise their zoning and subdivision powers to site a development. Typically, residential communities are located as planned unit developments (PUDs). The local government's interest is in fitting the PUD with surrounding land use patterns and with the mix of density and open space in the PUD.

Once the development is sited, the government's interest is primarily in maintaining the status quo in the development. Further regulation is generally incremental and comes into play if individual property owners try to expand the size of their dwelling units or add unusual accessory uses. Large-scale phased RCA developments often raise an additional land use interest. If the development is not completed as projected, the community may have an interest in changing the land use classification to encourage a more desirable development pattern.

This interest is somewhat different from the interest of the RCAs, which is more concerned with quality control over the long term; thus, RCAs regulate more of the details of land use. RCAs are much more concerned with the details of land use and with maintaining uniform structures over a long period of time. For example, homeowners are generally free to subscribe to cable TV, put up lamp posts, string clotheslines, or park any vehicle they choose in their front yard, but RCAs have regulated these choices. The regulation of cable access,[17] lamp post and clothesline location,[18] and pets[19] has been found to be within the power of the RCA. Thus, substantial differences remain between the interests of RCAs and public local governments.

Internal RCA Conflicts

Traditionally, legal analysis of RCA control over land use within the community has focused on conflicts between the association and dissident members because RCA members are subject to more land use and behavior controls than are citizens of a general unit of government. An RCA member is different from a public citizen in two respects. First, the RCA member may have greater control over the collection and allocation of private tax revenues compared to a citizen of general government. Second, an RCA member may have less protection against arbitrary actions than a citizen of a general purpose government.

Internal RCA conflicts also have external spillovers. This section surveys the law of internal land use controls, with an eye toward the external consequences of these controls, which are of interest to local governments.

Public choice theory has been used to justify dual citizenship. Students of local government have argued that people shop for governments like they shop for cars,[20] but ultimately most people become citizens of local governments with roughly equivalent powers. A person has a much greater range of choice whether to join an association. The choice may be constricted for urban dwellers who wish to purchase a condominium unit, but there is generally a sufficient supply of residential units with and without RCAs to give people a meaningful choice. Not surprisingly, public choice theory has been useful to conceptualize RCAs and the relationship between the regulations they impose and dissenting members.[21] All the distinctions stem from the greater option to participate in an RCA compared to a unit of local government.[22] Thus, participation in an RCA is a matter of choice.

The fact that a person is free to enter an RCA or live only in a political jurisdiction does not mean that an RCA member has no rights against the RCA. Freedom of entry controls only the types of rights. An RCA member does have certain common law property rights that give him an additional voice in land use controls beyond that granted by the association franchise.

These private rights can be described basically as the right to fiscal responsibility and use stability. This right is protected both by common law property doctrines and the emerging doctrines of judicial review of RCA "legislation." These interests prefer the community over the individual homeowner. The increasing use of RCAs creates considerable tension between individual claims to autonomy and the idea of community control. Increasingly, courts are asked to resolve these claims, and there is a growing law of individual RCA member rights.

Fiscal Control

The wide degree of choice that a person has to join an RCA generates expectations about the behavior of the RCA that are different from those generated by public units of local government. In all units of general government, the power to tax is unconstrained by a legal duty to match the involuntary expenditures with corresponding benefits. A citizen has no right to receive benefits in proportion to the general tax revenues that he pays, although there may be a right to have certain services financed by general tax revenues.[23]

The opposite expectation is generated in RCAs. People consent to membership in a private government with the power to tax because they expect that they will be able to capture a large portion of the expenditures in the value of their unit or in the enjoyment of direct benefits—exclusive common areas or clean swimming pools, for example. This follows from the basic assumption of public choice theory that people enter into private governments to maximize their welfare.[24]

An RCA is not a private redistributive scheme. A member has a right to the dedication of assessments to the benefit of the common property. Transaction cost considerations may dictate some form of representative government so each member need not agree to each expenditure. However, there is a role for checks to ensure that decisions do in fact enhance the efficient allocation of resources.[25] This consumer protection function historically has been performed by the courts, although some local consumer protection agencies provide advice to RCA members to enable them to assert what rights they have.

Member expectations are honored by two legal doctrines that recognize that RCA members have greater expectations of fiscal responsibility and freedom from forced redistributions of wealth compared to citizens of a general purpose government. The first protection is provided by the law of private restrictions, which requires that servitudes touch and concern the land in order to bind subsequent purchasers. There is considerable confusion about the meaning of this historic test, which courts have used to evaluate the validity of covenants and servitudes. Some find it bankrupt for this reason.[26] I disagree with this conclusion because the doctrine incorporates several valid functions, although these functions are not well captured in the courts' futile efforts to state a single doctrinal formulation.

One function of the touch and concern doctrine is judicial protection of purchaser expectations from risks such as fund diversion or uneven maintenance. The growing evidence of RCA member dissatisfaction with the performance of associations suggests a need for some judicial constraints on association decisions.

The first purchasers in an RCA strike an explicit and implicit bargain with the developer, which may be unilaterally altered as time passes. Consistent with this analysis, courts sensibly have used the touch and concern doctrine to police the assessment process. The modern law is premised on the assumption that members of an RCA have a right to have assessments dedicated to the benefit of the association.[27] Courts require that the RCA establish standards to allocate the assessments and that the members receive the primary benefit of the assessments.[28]

The second protection is the application of the business judgment doctrine to the decisions of the governors of an RCA. RCA directors have been compared to corporate directors. To catch obvious redistribution attempts, courts have imposed a fiduciary duty on the RCA directors toward their members.[29] This doctrine polices the decisions of an RCA by trying to decide when the directors have engaged in self-dealing as opposed to having made a good faith but unpopular business decision that benefits the members.[30] This doctrine provides minimum guarantees that RCAs function as representative governments, but does not intervene in efficient but unpopular decisions. Legislatures have also intervened to promote this result by regulating voting rights allocation in condominiums to ensure that representative government prevails during the time that the developer is selling out.[31]

Internal Stability

Courts also try to ensure that RCA members obtain the efficiency gains that they expect by participation in the RCA by maintaining the stability of the development. RCA land use restrictions are private servitudes. In a well-crafted development, the developer imposes a common scheme of servitudes on every lot. Each lot owner may enforce the servitude against each other lot.

The common plan doctrine is based on the premise that persons purchase a unit in a development on the expectation that all development will be similar or as initially represented and that there will be a high level of stability. These expectations are often protected by limiting the power of a developer or lot owner to modify the original common scheme. Three related doctrines can limit the power to modify: (1) the common plan may be construed to extend to several different tracts; (2) a court may impose limitations on a developer's reserved power to modify the common scheme; and (3) the change or mistake rule may be narrowly construed.

Scope of the Common Plan

Once the developer imposes a common scheme, it is permanent unless the developer has reserved the power to modify the scheme, or the plan contains a modification mechanism short of the unanimous consent of those benefited by the scheme. Large developments take place in phases, and a developer will generally wish to preserve discretion to respond to changed market conditions by limiting the geographical scope of the common plan. If this is done, tracts may be developed that are not subject to the plan, as the developer chooses. Sometimes, the developer is not clear about the geographical scope of the common plan. Homeowners in a restricted area may be able to prevent inconsistent development in an undeveloped area by convincing a court that the common plan extends to several tracts.

Courts have extended the common plan when developer advertising created the expectation that a certain area would be dedicated to open space or recreational use[32] or that the developer intended to protect the residents of the tracts first developed from inconsistent development in subsequent tracts.[33] This doctrine works both ways. A court can conclude equally that the developer did not intend to benefit early purchasers and thus is free to use

undeveloped tracts for different, usually more intensive, uses.[34]

Modification of the Common Plan

A developer will often retain the power to modify restrictions. Courts initially held that the reservation of such power by the developer was inconsistent with a common scheme, and thus no reciprocal rights were created against the developer.[35] In recent years courts have reexamined this doctrine and have begun to substitute a more consumer protection approach.

The core of the common plan doctrine is that reciprocal servitudes should be implied to protect the expectations of lot purchasers. This expectation analysis has been extended to limit the developer's power to modify as the development is completed. Increasingly, the developer's reserved discretion to modify, no matter how unlimited it is in form, is subject to a reasonableness test.[36] In general, this test limits the developer to minor rather than radical departures from the original scheme.[37]

Change or Mistake Rule

Stability is also preserved by the change or mistake doctrine, which limits the power of residents to remove restrictions that lower the value of some tracts of land in a development, generally those on the perimeter. The common law servitude most used to control land use is the equitable servitude. Equitable servitudes were recognized in 19th Century England to avoid the rigidities of real covenants and negative easements. In part because courts viewed equitable servitudes as contracts, they have been sensitive to the fact that servitudes imposed in the distant past may outlive their utility. Servitudes may be terminated by the unanimous consent of the holders or some percentage of the holders. However, older covenant schemes seldom considered the question of modification, and courts have long asserted the power to remove such restrictions. The basic theory is a contract one. Equity will not order specific performance when there has been a change of conditions such that the intended benefits of the scheme can no longer be realized.[38]

The easiest case is when the development has abandoned compliance with the restrictions.[39] Abandonment occurs when a substantial number of lots in the development do not comply with the restriction so that the change can be described as fundamental.[40] Abandonment shades into estoppel as courts give substantial weight to the RCA's failure to enforce the restrictions.[41]

The hardest case is when a lot owner argues that the intended value of the servitude can no longer be realized because of changed conditions in the general area. This is different from abandonment, but the argument is frequently made when land uses have changed outside the development and increased the opportunity costs of compliance with the covenants. Most courts enforce covenant schemes so long as the change is external,[42] regardless of the effect on the value of the restricted land.[43]

Interior lot owners in a restricted development benefit from the preferences protected by the change or mistake rule, but the enforcement of old servitudes can lead to the inefficient allocation of resources. For example, these stability doctrines may conflict with local land use policies because they impede the efforts of local governments to reallocate land to more intensive uses. Commentators have been concerned about the inefficiencies of the change or mistake rule,[44] but the doctrine is useful to check developer or resident behavior that is insensitive to the external costs that modification would impose.

Judicial Review of RCA Legislation

The more RCAs function like governments, the more unhappy RCA members take their grievances to court. Not surprisingly, courts are increasingly reviewing the decisions of RCAs, but the standards of review reflect great confusion about the nature of an RCA.[45]

All that is clear is that RCA members are receiving greater rights to question association procedures and greater substantive power to invalidate decisions. In short, the public-private distinction between RCAs and general purpose governments is collapsing through a series of judicial decisions subjecting RCA actions to stricter scrutiny.

The immediate consequences of this development for units of local government are not obvious. The new member rights are being created by courts and to a lesser extent by state legislatures. These rights do not change the position of either the RCA or its members toward the general purpose government. There are, however, some links between RCA member conflicts and public governments. The greater power that individual members have to contest RCA decisions means that the original plan of the development, on which the city may also rely, may not be carried out.

Confusion over the decree of protection goes to the heart of the relationship between an association and its members. If membership in an RCA is voluntary, then the member has a limited expectation to question the decisions of an association. Courts have often cited the reality of members "living in such close proximity and using facilities in common" as a justification for RCA regulation that limits individual freedom of choice.[46] Self-dealing and the failure to follow established procedures would be the obvious exceptions.[47] This should hold no matter how closely an RCA resembles a general purpose government.

However, courts are increasingly sympathetic to arguments that an RCA's members should have a similar if not the same right as citizens of a general purpose government to be free from arbitrary action. Thus,for example, early cases suggested that—unlike a public government—an RCA could exercise an architectural review covenant without standards to guide the exercise of discretion.[48] Courts generally require the exercise of discretion to be reasonable,[49] which forces the adoption of standards.

Proponents of increased member protection argue that RCAs are de facto cities and should be subject to constitutional constraints. To equalize the position of RCA members with citizens of a general purpose government, the state action doctrine must be overcome. This is not easy. State action, that is, some affirmative promotion of the activity, must be present before the constitution applies to a private entity.[50] To date, courts have held that state approval of the articles of incorporation of an RCA and general state regulation do not constitute sufficient state involvement to trigger the state action doctrine.[51] An alternative route to state action is the doctrine of *Marsh* v. *Alabama*,[52] which holds that private governments that function as general purpose ones are subject to the Constitution. Even though the doctrine was developed to protect residents of company towns, courts are increasingly flirting with its application to RCAs.[53]

Many courts have tried to avoid the state action problem simply by subjecting post-formation RCA bylaws to a reasonableness standard.[54] The reasonableness standard allows a court to determine whether the RCA bylaw promotes the health, happiness, and peace of mind of the members. Reasonableness review will often validate the association's action, but it may also give the member the functional equivalent of constitutional protection. Decisions banning cats,[55] the consumption of liquor in the clubhouse,[56] and political signs[57] have been invalidated under this standard.

External Conflicts

External relations between the RCA and the community take place within existing legal doctrines and, with one exception, have not been analyzed as a separate problem.[58] Changes in the composition of federally subsidized projects, for example, have been challenged by neighbors as violations of the city's comprehensive plan as well as violations of the internal restrictions.[59] Courts have worked out a relationship between public and private controls when the two conflict. The existing law is premised on the assumption that a member of an RCA has submitted to two levels of government and must comply with the rules of both. The general rules are that if a private restriction is less restrictive than a zoning ordinance, the local government can enforce its land use policies and the ordinance prevails over the covenant.[60] The private restriction is not, however, terminated.[61] If the private restriction is more restrictive, both the restriction and the ordinance are enforced.[62] Therefore, the property owner must comply with both.[63] For example, if property is zoned for a higher intensity classification such as commercial, but a private restriction limits the use of the property to a lower intensity use such as residential, the property owner is limited to the use specified in the restriction.[64] The law of the relationship between public and private restrictions assumes that the public restriction does not represent a strong local interest and that in most cases the private restriction is consistent with the community interest and may even enhance it. If these assumptions do not hold, then the traditional law begins to break down and courts may strike a different balance between the public and private restrictions.

Cities have indirect power to terminate restrictions that are more intensive than the city's current zoning for an area. Courts of equity have long refused to enforce private restrictions when conditions in the area have changed. Most courts limit the doctrine of "changed conditions" to changes that have occurred within the boundaries of the common plan, but zoning changes within and without this area are relevant evidence of changed conditions. Thus, the courts have the power in limited situations to declare that a private restriction has been superseded by a public one.

The law may be different for social restrictions that trench on constitutionally protected values and for restrictions that contravene policies established by higher levels of government. Courts have upheld covenants that limit the age of the occupants of residential units because the owner accepted a deed with the restriction[65] and because age is not an inherently suspect class and thus there is no strict scrutiny of the restriction.[66] California, however, has held that private restrictions limiting occupancy to persons 45 and older violate the state law and the state constitutional guarantee of privacy, which includes the right to choose where to live. An RCA was classified as a business establishment and found to violate the state civil rights act. Residential age restrictions are exempt from the act to promote housing for the elderly, but the court concluded that the subdivision did not qualify for the exemption.[67] Now the federal *Fair Housing Act* amendments of 1988 rule out age restrictions, except for bona fide retirement communities.

Courts may also enforce public policies against RCAs that are grounded in state legislation. The best example of this is the quite uniform judicial promotion of deinstitutionalization. RCAs opposed various

types of treatment facilities as violations of covenants limiting the use of land in an association to single family residences. Courts either found that the covenant permitted the facility,[68] or held that the exclusion of a facility through a restrictive covenant would violate the state public policy of deinstitutionalization.[69]

Conclusion

The law of public and private land use controls developed on separate tracks because there was no perception of the interrelationship between the two systems of land use governance. In fact, there has been limited analysis of the relationship between private controls and RCAs. Common law servitudes antedate the development of RCAs; they have been adapted to the RCA concept, but the fit between private controls and RCA governance is not complete. This public-private separation was reinforced in the 1920s when public land use controls became the primary means of land use control.

This paper has examined the ways in which the two systems of land use control interact. There is a strong case for the continued maintenance of the two systems. However, there is also a need to recognize that the two systems of land use control may not always complement each other. It is premature to suggest a need for greater integration of the two systems, but public and private governments must be more aware of what the other is doing and why.

NOTES

[1] See Patrick J. Rohan, *Real Estate Transactions: Home Owner Associations and PUDs* (New York: Matthew Bender, 1988), sec. 2.02 for a brief discussion of the evolution of RCAs.

[2] Uriel Reichman, "Residential Private Governments: An Introductory Survey" 43 *University of Chicago Law Review* (1976): 253.

[3] See Marc A. Weiss, *The Rise of the Community Builders: The American Real Estate Industry and Urban Land Planning* (New York: Columbia University Press, 1987).

[4] E.g., Association of Unit Owners of the Inn of the Seventh Mountain v. Greenfield, 277 Ore. 259, 560 P.2d 641 (1977), purchaser of condominium unit automatically a member of the association and liable for lawfully levied assessments.

[5] See e.g., G. Longhini and D. Mosena, *Homeowner's Associations: Problems and Remedies*, Planning Advisory Service Report No. 337 (Chicago: American Planning Association, 1979); C. Moore, *PUDs in Practice* (Washington, DC: Urban Land Institute, 1985; and S. Barton and C. Silverman, *Common Interest Homeowners' Associations Management Study* (Sacramento: California Department of Real Estate, 1987).

[6] Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* (Chicago: American Law Institute, 1981), pp. 6-7.

[7] All Seasons Resorts, Inc. v. Abrams, 68 N.Y.2d 81, 497 N.E.2d 33, 506 N.Y.S.2d 10 (1986). RCAs differ from condominiums in that title to the common property in an RCA is held by the corporation, whereas title to the common property is concurrently owned by the individual condominium unit owners.

[8] See Patrick J. Rohan, secs. 7.01-7.03 for an analysis of the structure of association governance.

[9] See Rohan, secs. 8.01-8.05 for an analysis of the technical requirements for the enforcement of common law servitudes.

[10] See Rohan, secs. 9.01-9.03. Recent cases include Chesapeake Ranch Club, Inc. v. Garczynski, 71 Md. App. 224, 524 A.2d 805 (1987); Perry v. Bridgeton Community Ass'n., Inc., 486 So.2d 1230 (Miss. 1986).

[11] See Freyfogle, "A Comprehensive Theory of Tort Liability," 39 *University of Florida Law Review* (1987): 877.

[12] E.g., Maryland Homeowners Association Act, House of Delegates No. 388 (March 25, 1988).

[13] See S. Tomioka and E. Tomioka, *Planned Unit Development Design and Regional Impact* (1984), pp. 167-168.

[14] Campbell v. Glacier Park Co., 381 F. Supp. 1234 (D. Idaho 1974).

[15] See Municipality of Upper St. Clair v. Boyce, 531 A.2d 111 (Commonwealth. Ct. 1987). Municipality may require completion of improvements in previously approved phase before granting final approval of subsequent phase.

[16] Wallington Home Owners Association v. Borough of Wallington, 327 A.2d 889 (N.J. 1974).

[17] Dynamic Cablevision of Florida, Inc. v. Biltmore II Condominium Association, 498 So.2d 632 (Fla. App. 1986).

[18] Amoco Realty v. Montalbano, 133 Ill. App.3d 327, 478 N.E.2d 860 (1985), four stone lamp posts prohibited; Beckett Ridge Association-I v. Agne, 498 N.E.2d 233 (Ohio App. 1985), clothesline in planned unit development prohibited.

[19] Chateau Village North Condominium v. Jordan, 643 F.2d 791 (Colo. App. 1983).

[20] Charles Tiebout, "A Pure Theory of Local Expenditures," 64 *Journal of Political Economy* (1956): 416.

[21] This paper takes no position on the relevance of public choice theory to public governments. See "Symposium on the Theory of Public Choice," 74 *Virginia Law Review* (1988): 167.

[22] The importance of this distinction is developed in Ellickson, "Cities and Homeowners Associations" 130 University of Pennsylvania Law Review 1519, 1521-1526 (1982).

[23] Pennell v. City of San Jose, 108 S.Ct. 849 (1988) (Scalia, J. dissenting).

[24] RCA membership does not conform to the strict standards of public choice because governance procedures do not fully measure the intensity of preferences, see Ellickson, *Cities and Homeowners Associations*, but they have the potential to conform to this standard compared to general purpose governments. See Robert Nelson, "The Privatization of Local Government: From Zoning to RCAs," in this volume.

[25] See Epstein, "Notice and Freedom of Contract in the Law of Servitudes" 55 *Southern California Law Review* (1982): 1353.

[26] Ibid.

[27] The leading case is Beech Mountain Property Owners Association, Inc. v. Seifart, 48 N.C. App. 286, 269 S.E.2d 178 (1980).

[28] Compare Figure Eight Beach Homeowners Association v. Parker, 303 S.E.2d 336 (N.C. 1983) with Snug Harbor Property Owners Association v. Curran, 284 S.E.2d 752

(N.C. 1981). See French, "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands" 55 *Southern California Law Review* (1982): 1261, 1289-1292.

[29]Schwartzmann v. Association of Apartment Owners of Bridgehaven, 33 Wash. App. 397, 655 P.2d 1177 (1982).

[30]E.g., Rywalt v. Writer Corp., 34 Colo. App. 334, 526 P.2d 316 (1974); Papalexiou v. Tower West Condominium, 167 N.J. Super. 516, 401 A.2d 280 (Ch. Div. 1979), emergency assessment; Thanasoulis v. Winston Tower Association, Inc., 214 N.J. Super. 408, 519 A.2d 911 (App. Div. 1986), board could increase parking fees of tenants of nonresident owners.

[31]Fla. Rev. Stat. ch. 718.

[32]Ute Park Summer Homes Association v. Maxwell Land Grant Co., 83 N.M. 558, 494 P.2d 971 (1974).

[33]Berger v. Van Swearingen Co., 6 Ohio St.2d 100, 216 N.E.2d 54 (1966).

[34]E.g., Forbes v. Schaefer, 310 S.E.2d 457 (Va. 1983); Fournier v. Katter, 238 A.2d 12 (N.H. 1968).

[35]Suttle v. Bailey, 361 P.2d 325 (N.M. 1961).

[36]The leading case is Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc., 303 So.2d 665 (Fla. App. 1974). Accord: Wright v. Cyprus Shores Development Co., 413 So.2d 1115 (Ala. 1982).

[37]E.g., Carrigan & Boland, Inc. v. Worrock, 402 So.2d 514 (Fla. 1981), developer could remove covenant obligating him to build a common dock when he failed to gain the requisite permission for the facility.

[38]Sandstrom v. Larsen, 583 P.2d 971 (Hawaii 1978).

[39]E.g., Lamina-Panno-Fallo, Inc. v. Heebe, 352 So.2d 1303 (La. 1977), 59 out of 70 parcels subject to prohibition of commerical uses were being used for commerical purposes.

[40]Exchange National Bank of Chicago v. City of Des Plaines, 336 N.E.2d 8 (1975).

[41]Dauphin Island Property Owners Association v. Kuppersmith, 371 So.2d 31 (Ala. 1979), acquiescence in violation of one restriction does not estop association from enforcing another.

[42]E.g., Elliott v. Jefferson County Fiscal Court, 657 Ky. 237 (1983); Cordogan v. Union National Bank, 64 Ill. App. 3d 248, 380 N.E.2d 1194 (1978); Cunningham v. Hiles, 395 N.E. 2d 851, modified on other grounds, 402 N.E. 2d 17 (Ind. 1979); Redfern Lawns Civic Association v. Currie Pontiac Co., 44 N.W. 2d 8 (1950).

[43]Southshore Homes Association v. Holland Holliday's, 549 P. 2d 1035 (Kan. 1976); Eilers v. Alewel, 393 S.W. 2d 584 (Mo. 1965).

[44]E.g., Sterk, "Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions," 70 *Iowa Law Review* (1985):65. Winokur, "Association-Administered Servitude Regimes: A Private Property Perspective," in this volume, explores procedures to lift inefficient servitudes.

[45]See, e.g., "Note, The Rule of Law in Residential Associations," 99 *Harvard Law Review* (1985):472; "Note, Condominium Rulemaking—Presumptions, Burdens and Abuses: A Call for Substantive Judicial Review in Florida," 34 *University of Florida Law Review* (1982): 219 and "Note, Judicial Review of Condominium Rulemaking," 94 *Harvard Law Review* (1981): 647.

[46]Hidden Harbor Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. App. 1975); White Egret Condominium v. Franklin, 379 So. 2d 346 (Fla. 1979).

[47]Board of Managers of Village Square I Condominium Association v. Amalgamated Trust & Savings Bank, 144 Ill. App. 3d 522, 494 N.E. 2d 1199 (2d Dist. 1986).

[48]Rhue v. Cheyenne Homes, Inc. 168 Colo. 6, 449 P. 2d 361 (1969).

[49]Oakbrook Civic Association v. Sonnier, 481 So. 2d 1008 (La. 1986).

[50]See Katharine Rosenberry, "Condominium and Homeowner Associations: Should They Be Treated Like 'Mini-Governments?'" 8 *Zoning & Planning Law Report* (October 1985), reprinted in this volume.

[51]Laguna Royale Owners Association v. Drager, 199 Cal. App. 3d 670, 174 Cal. Rptr. 136 (1981).

[52]Marsh v. Alabama, 326 U.S. 501 (1946).

[53]See Franklin v. Spadafore, 388 Mass. 764, 447 N.E. 2d 1244 (1983).

[54]Hidden Harbor Estates, Inc. v. Basso, 393 So. 2d 637 (Fla. App. 1981).

[55]Chateau Village v. Jordan.

[56]Hidden Harbor Estates v. Norman, 309 So. 2d 180 (Fla. App. 1975).

[57]Cashio v. Shoriak, 481 So. 2d 1013 (La. 1986), construction of covenant banning signs to include political signs would be "absurd."

[58]E.g., Shalimar Association v. D.O.C. Enterprises, 142 Ariz. 36, 688 P. 2d 682 (1984).

[59]Fletcher v. Romney, 323 F. Supp. 189 (S.D. N.Y. 1971).

[60]McDonald v. Emporia-Lyon County Joint Board of Appeals, 697 P. 2d 69 (Kan. 1985), grant of setback variance does not terminate private setback restrictions.

[61]E.g. Stanninger v. Jacksonville Expressway Authority, 182 So. 2d 483 (Fla. App. 1966).

[62]Annison v. Hoover, 517 So. 2d 420 (La. Ct. App. 1987).

[63]The property owner has standing to challenge the zoning ordinance even though a covenant also applies. Our Way Enterprises v. Town of Wells, 535 A. 2d 442 (Me. 1988).

[64]Schwartz v. State, 95 Misc. 2d 525, 408 N.Y. S. 2d 239 (1978), commercial zoning does not supersede residential restriction; Harwick v. Indian Creek Country Club, 142 So. 2d 128 (Fla. App. 1962), multiple family zoning does not supersede single family restriction.

[65]Covered Bridge Condominium Association v. Chambliss, 705 S.W. 2d 211 (Tex. Civ. App. 1985); White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979).

[66]Pomerantz v. Woodlands Section 8 Association, 479 So. 2d 794 (Fla. App. 1985).

[67]Park Redlands Covenant Control Committee v. Simon, 226 Cal. Rptr. 199 (Cal. App. 1986).

[68]Knudtson v. Trainor, 345 N.W. 2d 4 (Neb. 1984); Blevins v. Barry Lawrence County Association for Retarded Citizens, 707 S.W. 2d 407 (Mo. 1986); City of Livonia v. Department of Social Services, 378 N.W. 2d 402 (Mich. 1985); Smith v. Association of Retarded Citizens for Housing Development Services, 331 S.E. 2d 324 (N.C. App. 1985); and Collins v. City of El Campo, 684 S.W. 2d 756 (Tex. App. 1984).

[69]Crane Neck Association v. New York/Long Island Community Group, 472 N.Y. S. 2d 901 (N.Y. 1984).

Association-Administered Servitude Regimes: A Private Property Perspective

James L. Winokur
Professor of Law
College of Law
University of Denver

That the U.S. Advisory Commission on Intergovernmental Relations chose to sponsor a conference on residential community associations (RCAs) reflects a growing recognition that RCAs constitute an important, relatively new type of local governance in the United States. The number of RCAs has grown dramatically in recent decades, which may attest to their increasing importance. The United States now has approximately 130,000 RCAs,[1] governing residences of as many as 12 percent to 15 percent of the population,[2] and the ranks of such community associations are growing rapidly.[3]

This article views community associations as most fundamentally an outgrowth of a species of private property. These associations are legally constituted pursuant to "servitudes"—easements, real covenants, and equitable servitudes—that bind private land ownership. The impacts of these association administered servitude regimes can be evaluated in terms of private property's traditional and most fundamental societal functions: the promotion of individual liberty and efficient resource allocation.

The Rise of Association-Administered Servitude Regimes

During the past century and a half, Anglo-American law has evolved from largely disfavoring enforcement of such consensual private arrangements between successors in ownership to the creating parties to strongly supporting enforcement between successors in an ever-increasing range of settings.[4] As the growth of RCAs reflects, the most common and most important use of servitudes enforceable between successors has been in association-administered residential servitude regimes. These association regimes now predominate in some substantial suburban markets for new housing, and they control increasing shares of such markets nationally.[5]

The recent dramatic growth of association regimes has been spurred by the trend toward

Copyright 1988, James L. Winokur. Printed with permission.

planned unit developments (PUDs), through which developers have controlled costs by clustering homes on smaller individual lots, designing streets and other infrastructure to less exacting standards.[6] While some aspects of PUDs are reviewed more flexibly, local governments have now come almost universally to require planned open space and other common areas to offset potential crowding in cluster developments. Usually, developers either opt against public dedication of these common areas and community infrastructure to avoid more exacting government standards or local governments reject dedication and its attendant maintenance responsibilities. In place of government ownership of common areas, associations of owners have been created to own and manage these open spaces facilities.

To support association management, covenants among owners within each development must bind residents to association membership and financial support for the maintenance tasks. Association-administered use restrictions applicable throughout each development have seemed a natural addition to the associations' responsibilities.

Association regime communities are frequently low-density subdivisions of single-family residences, most virtually uniformly designed.[7] Neighborhood uniformity is preserved by a complex battery of restrictions by which even minor aesthetic changes are limited and often prohibited without advance approval of a neighborhood architectural review committee. Such residential servitudes[8] bind owners of property or their successors for several decades, or sometimes permanently. Restrictions are usually reciprocally enforceable among residence owners within a subdivision or condominium project, and also by the homeowners or condominium association.

The land use stability promised by servitudes has persuaded modern courts and scholars that servitudes enhance the land values they were once thought to diminish.[9] Neoclassical economic analysis is marshaled to support servitude enforceability, viewing servitudes as among the land interests that should be freely transferable. By this analysis, honoring the creation and transfer of servitude rights helps the market to allocate land to its highest and best use.[10] Servitudes, the economists argue, utilize market transactions to transfer control over residential uses. From these economists' perspective, servitude transactions establish by mutual consent that the neighbors and community associations who thereby gain use control must surely value that control more than the individual homeowners who voluntarily agree to relinquish control over use of their own property when they buy their homes.

By its emphasis on the presumed rational election of each subject landowner to enter into servitude arrangements, neoclassical economic analysis supporting servitude enforcement accords with notions of private property protecting individual liberty.[11] Servitude enforcement honors each landowner's free choice to exchange less desirable control (over one's own land) for more desirable control (over uses throughout the servitude regime community).[12] Freedom of property and freedom of contract are thereby reaffirmed.

The Mixed Blessings of Servitude Regimes

Promissory servitudes and association-administered servitude regimes help maintain the desirable character and quality of many residential areas. They support neighborhood characteristics important to many residents who value quiet, privacy, and status; prefer car transportation to walking or public transit; and favor supermarkets and shopping center department stores over ethnic or esoteric neighborhood shops.[13] Consistency of aesthetic design throughout a neighborhood can produce residential areas of striking beauty. Servitudes mandate continuing resident financing of common area maintenance, alleviating residents' individual maintenance burdens.

In their impacts on use segregation, economic efficiency, individual liberty and personal identity, however, association-administered servitude regimes confer mixed blessings.

Use Segregation. Fundamental in the design of most servitude regimes is segregation of residential uses from industrial and commercial uses, and often segregating single-family from multifamily residences.[14]Such increasingly universal segregation of residential uses from other uses is viewed by some observers as unwise—actually threatening the neighborhood safety it was intended to promote, forcing reliance on automobile transportation to gain access to even basic commercial needs, sapping neighborhood vitality, and encouraging blight.[15] Currently available empirical evidence leaves the correlation between segregation of land uses and land values in doubt.[16]

Economic Inefficiencies. As servitude regimes come to dominate particular housing markets,[17] the presumed economic efficiencies of servitudes are often undercut by standardized association-administered regimes, leaving housing consumers little choice as to the restrictions that will constrain their home life.

Typically, subdivision restrictions are drawn up by the development team without the participation of lot owners.[18] Because enforcement among neighbors requires a common development plan of uniform restrictions applicable throughout a servitude regime,[19] prospective purchasers unwilling to accept servitudes as drafted for a home within such a regime must reject purchase of the home altogether. But objectionable features in one set of restrictions will

increasingly be contained in restrictions of other area subdivisions as residences are governed by increasingly standardized forms.[20] Servitude standardization is intensified by state real estate agencies and federal secondary mortgage agency regulatory oversight. Rather than fight bureaucratic tastes, developers regularly and simply lift servitude language directly from government forms.[21]

Economists have justified form contracts as efficiently generating the type of fair bargains individual and competitive negotiations often force, while avoiding the prohibitive transaction costs of negotiating each agreement separately.[22] The economists' form contract defense depends on market discipline by marginal consumers sufficiently numerous and sophisticated to represent generalized buyers' interests, protecting even the uncomprehending consumer by pressuring sellers into a combination of form contract revisions and enforcement concessions offered across the entire market.[23]

In the context of servitude regimes, however, home sellers cannot realistically consider modifications in servitude language proposed by potential buyers,[24] and negotiation of concessions among potential enforcers is often logistically impossible.[25]

Given that servitude creators (developers) are quite distinct from the homeowners who will eventually enforce the servitudes, marginal consumers in servitude regimes cannot assure market fairness as they might in other vendor-purchaser settings. Although developers have strong long-term interests in refining servitude schemes, experience with problems over the long lives of servitude regimes necessarily accrues slowly. Developers' servitude drafting refinements can generally benefit only future regimes. Meanwhile, less refined servitude regimes proliferate, creating potentially permanent, inflexible arrangements likely to have their most severe restrictive impact long after developer enforcement has given way to enforcement by a host of less manageable, less predictably businesslike neighbors.

Where servitudes are part of a common development plan for large subdivisions, and provision for servitude modification is not drafted into the original documentation,[26] overwhelming transaction costs will often prevent modification of obsolete servitudes.[27] Transaction costs thus distort the allocative (and reallocative) efficiency of the residential market.[28] These costs will include the time and money to locate, meet with, and reduce to writing agreement of all owners of property in the servitude regime, community association representatives and possibly the developer, not to mention the market distortion likely to result from holdouts within this large group.[29]

Judicial doctrines governing servitude enforcement further restrict servitude flexibility. For example, courts often enforce servitudes, unlike many other forms of contract, by injunctive relief ordering compliance with the restrictions. In contrast, if only money damages were available to redress servitude breaches, an individual owner could elect unilaterally to violate a servitude restriction where the resulting damage would be predictably small.[30] The judicial doctrine rejecting servitude enforcement where "changed circumstances" have frustrated a servitude's purpose,[31] viewed by some as an important antidote to servitude obsolescence,[32] is never simple to apply, and scarcely efficient. The unpredictability of the changed circumstance doctrine is, itself, a distinct litigation burden, often deterring any assertion in court of servitude obsolescence.[33]

Limitation of Individual Liberty. Home buyers' ignorance of servitudes undercuts the notion that ready salability of servitude regime homes reflects the autonomous will of those they bind, or demonstrates the market desirability of servitudes. Purchasers of servitude regime properties are often oblivious to applicable servitude documents,[34] which in many states need not be called to a purchaser's attention or even be recorded in order to remain binding.[35] Servitude documentation is long, technical, boring reading for lay persons,[36] who rarely retain attorneys to review home purchase documents.[37]

Even those who see and read applicable servitudes in advance may inaccurately project their own future attitudes toward restrictions over multidecade servitude terms.[38] Purchasers aware of applicable servitudes and their purposes from their inception may be seeking the security of highly structured neighborhoods, consciously trading their own future autonomy for regimentation that progressively undercuts personal identity.[39]

Whatever their motives upon entering servitude regimes, homeowners in such regimes find even details of their home life strictly regulated. Beyond merely segregating residential from nonresidential use, servitude regimes restrict residents' age and childbearing practice,[40] religious practice,[41] financial and social compatibility,[42] family or marital status,[43] and commercial and political speech within developments.[44] Owners' association architectural review boards typically are granted veto power not only over major structural changes[45] but also over many minor details of personal behavior and aesthetic judgments.[46] Architectural review requirements restrict such matters as exterior paint colors,[47] window awnings,[48] window air conditioners,[49] the color of swing sets[50] and the use of doghouses.[51] Review may be extremely intricate and technical,[52] or sweepingly broad,[53] or there may be no limiting criteria at all.[54]

best copy available

Studies spanning the past two decades report great resident dissatisfaction with servitude regimes.[55] Litigation challenging association enforcement of servitudes have increased dramatically during the same period. For example, after steadily increasing from 1957 to 1977, reported American state court appellate decisions multiplied more than seven times over from 1977 to 1982, and then doubled again from 1982 to 1987.[56] In California, a startling 5 percent of all associations surveyed report actually having been sued in the past year alone.[57] As the tens of thousands of recently created servitude regimes age beyond their first few years, conflict between the servitudes' mandates and altered relative land use values will likely generate even greater conflict than has yet been reported.[58]

This resident dissatisfaction and conflict suggest important limits on the desirability of servitude regimes. Home purchasers requiring family-sized houses face increasingly limited alternatives to homes within servitude regimes. RCA homeowners' increasing resentment suggests that many residents who continue living in such communities do so despite the servitudes rather than because of them.

Impacts on Personal Identity. Among the impacts of servitude regimes is tangible reinforcement of the process of abstraction and standardization of societal components that, in an earlier age, differentiated place from place, and highlighted the uniqueness of each person's character and style.[59] Some coordination of uses and aesthetic styles on a neighborhood-wide scale undoubtedly can generate both substantial economies and strikingly beautiful visual effects. But these come at a real cost, especially when individuals are thereby barred from controlling even the details of styling and improvements to their own homes. At stake in enforcing neighbors' control over other people's homes is a significant component of the sense of self and personal identity—control over one's own life and home necessary for human flourishing.[60]

Implications for Servitude Doctrine

These mixed impacts of these servitudes should by no means undercut enforcement of all servitudes. Servitude impacts vary with the substance and enforcement context of each restriction. Yet, reform that relies heavily on case-by-case review of servitude enforcement would be ill advised. Judicial doctrines require litigation, which is prohibitively expensive, imposing risks on parties evaluating which uses will be permitted on land they consider acquiring.[61] To optimize servitude regimes, doctrinal reform should simplify the rules governing enforcement. Rather than restrict substantive servitude coverage further, reform should restructure ongoing relations among servitude parties to promote realistic servitude adjustment according to evolving needs and values. Because these needs and values will change more and more over time, easing modification of only older servitudes could moderate onerous servitude problems, while honoring the creators' intentions in the earlier, more predictable years.

Shifting the burden of addressing servitude obsolescence from the discretionary changed circumstances doctrine to a statutory limitation on enforcement beyond a fixed durational limit is the most urgently needed doctrinal servitude reform. Servitude enforcement limitations beyond a fixed initial term should allow ongoing reexamination of older servitudes by those within the servitude regime relatively free from holdouts based on strategic bargaining.

Under the type of servitude durational limit most frequently proposed, servitudes would at some fixed date either become automatically unenforceable, or subject to modification by majority vote of the owners. The results of such reform would tend toward all or none; the initial servitude term would usually be followed by preservation of the regime unchanged, or elimination of all private restrictions. All lots will be similarly restricted or nonrestricted, and differences by degree in the definitions of permitted versus restricted uses will be almost impossible to negotiate.

A more useful enforcement limit on older promissory servitudes[62] might provide that, beyond perhaps 20 years from their creation, servitudes against a lot would remain enforceable only if the number of parcels thereafter entitled to enforcement against that lot was fewer than, say, 11.[63] Servitudes mutually enforceable between all lot owners in a larger development would be affected only after their initial 20-year term, at which point the servitudes would become unenforceable unless the servitude documentation limited potential enforcers. But servitudes would remain in force where the documentation identified, for each lot, a 12-lot or smaller group or "pod" within which enforcement would thereafter be ordered. Beyond 20 years, any servitude modification would be decided and applied only within a given enforcement pod, and only by unanimous agreement of all its constituents. Enforcement by an owners association beyond the initial term could occur, but only to the extent at least one owner within the enforcement pod so requested.

Designation of enforcement pods would be made by the developer as part of the original servitude documentation, based presumably on location grouping adjacent homes in the same pod. Thus, homes likely to be most affected by the externalities of each other's use would remain mutually accountable.[64]

If the enforcement pods proposal were implemented, injunctive relief would remain available

beyond the initial 20-year term. Relegating enforcement to damages on behalf of pod members, with no relief of any kind available across pod boundaries, could distribute the compensation inequitably. Since impacts of proposed use could spread beyond a user's pod, injunctive relief would distribute benefits of continued enforcement more fairly to all parties affected.

Durational limitations on servitudes enforceable by many neighbors should not apply to monetary obligations, the proceeds of which are committed to maintenance of common areas. As compared with use restrictions, relatively little of the reported dissatisfaction and conflict within servitude regimes has focused on owners' association dues and assessments.[65] Termination of such financing arrangements would threaten continued maintenance of community improvements, raising the specter of either severe deterioration of these facilities or grossly unfair distribution of maintenance burdens.

Servitude reform such as proposed here would ideally take the form of new state legislation. Regardless of such legislation, however, individual developers would best serve the eventual residents' long-term interests by incorporating such an enforcement pod scheme for enforcement of older restrictions into servitude regimes they create.

NOTES

[1] Community Associations Institute (CAI), *Community Associations Factbook* (Alexandria: 1988), pp. 7, 9. A current California study estimated there are between 13,000 and 16,000 owners' associations in that state alone, see Stephen Barton and Carol Silverman, *Common Interest Homeowners' Associations Management Study: Report to the California Department of Real Estate* (Berkeley: University of California, Institute of Urban and Regional Development, 1987), p. 2 (Barton and Silverman, California Study).

[2] The CAI currently estimates that 29.64 million residents—12.1 percent of U.S. residents—live in homes within association-administered servitude regimes. *CAI Factbook*, p. 9. For the 15 percent estimate, see Bowler and McKenzie, "Invisible Kingdoms" 5 *California Lawyer* (December 1985): 55, drawing on earlier CAI estimates. Bowler and McKenzie note further that the percentage of residential properties—especially new residential properties—so governed is substantially higher in some growth cities. See also Richard Louv, *America II* (New York: Penguin, 1983), pp. 109-110, estimating aggregate community association membership five years ago to include nearly 10 million people.

[3] The CAI now projects a 73 percent growth in the number of residential community associations by 2000, to a total of 225,000 associations, an increase in absolute numbers even greater than the CAI estimated growth from 1975 to 1988, and almost 500 percent more than the CAI estimated growth from 1962 to 1975. *CAI Factbook*, p. 9. CAI's estimates and growth projections continue to rise. By contrast to these current projections, mid-1987 CAI estimates projected 4,000-5,000 new common interest associations being created per year, according to a telephone interview by Nathan Simmons with Douglas M. Kleine, CAI Director of Research, July 9, 1987 (hereinafter Simmons-Kleine interview), on file with author. At that time, Dr. Kleine estimated there were about 100,000 associations in existence, compared to the current CAI estimate of 130,000 associations.

[4] The new interdependence in land uses that accompanied the Industrial Revolution demanded a more flexible catalog of private land use arrangements than previously recognized. English courts had feared earlier that servitudes binding successors in ownership would unduly encumber land titles with an unlimited variety of perpetual, possibly undiscoverable, land burdens. For the classic anti-servitude decision, see Keppell v. Bailey, 39 Eng. Rep. 1042 (Ch. 1834). These concerns were eventually overridden in Tulk v. Moxhay, 41 Eng. Rep. 1143 (Ch. 1848), recognizing "equitable servitudes," enforceable between successors in ownership. American courts followed England's lead, ultimately enforcing more types of promissory servitudes, implying reciprocal promissory servitudes in residential subdivisions, and readily inferring the consent of landowners to be bound by them.

[5] Louv, pp. 109-110, estimates that approximately 70 percent of all new housing built in San Diego and Los Angeles counties is subject to association-administered servitude regimes. See also notes 1 and 2.

[6] See generally, e.g., C. James Dowden, *Community Associations: A Guide for Public Officials* (Washington, DC: Urban Land Institute, 1980), pp. 7-13.

[7] The CAI estimates about 20 percent of current servitude regimes are "mixed architectural types." *CAI Factbook*, p. 9.

[8] These servitudes are often called CC&Rs (conditions, covenants and restrictions).

[9] See, e.g., Charles Clark, *Real Covenants and Other Interests which "Run with Land"* (2d ed. 1947), p. 134; 2 *American Law of Property* (A. James Casner, ed., Boston: Little Brown, 1952), Sec. 9.24 (A.L.P.); Note, "Affirmative Duties Running with the Land" 35 *New York University Law Review* (1960): 1344, 1351.

[10] For examples of neoclassical economic/legal analysis endorsing servitude enforceability as promoting allocative efficiency, see, e.g., Richard A. Posner, *Economic Analysis of Law*, 3rd edition (Boston: Little Brown, 1986), Sec. 3.8; Richard A. Epstein, "Notice and Freedom of Contract in the Law of Servitudes" 55 *Southern California Law Review* (1982): 1353; Robert C. Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls" 40 *University of Chicago Law Review* (1973): 681, 713.

[11] The close relationship between the arguments of neoclassical free market economics and notions of property and contract as fundamental guardians of individual liberty echoes the 17th Century philosophy of "possessive individualism." See e.g., Patrick S. Atiyah, *The Rise and Fall of the Freedom of Contract* (New York: Oxford University Press 1979), pp. 219-562; Crawford B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (New York: Oxford University Press, 1962).

[12] As in economic analysis, the value differential between control over one's own property versus over neighboring property is established by each owner's choice to exchange the former for the latter, by entering into the servitude relation.

[13] See e.g., Herbert Gans, *People and Plans: Essays on Urban Problems and Solutions* 29-30 (1968).

[14]See e.g., Richard R. Powell, *The Law of Real Property*, para. 670 (2), Patrick J. Rohan ed. (New York: Matthew Bender, 1981); *American Law of Property* (A. James Casner, ed., Boston: Little Brown, 1952, 1976), 2, sec. 9.24; Note, "An Evaluation of the Applicability of Zoning Principles to the Law of Private Land Use Restrictions," *UCLA Law Review* 21 (1974): 1655, 1665; Robert H. Consigny and Zigurds L. Zile, "Wise Use of Restrictive Covenants in a Rapidly Urbanizing Area," *Wisconsin Law Review* (1958): 612, 613.

[15]These criticisms are reflected in the writings of Jane Jacobs. See *The Death and Life of Great American Cities* (New York: Random House, 1961). Though she may be the best known, Jacobs was by no means the earliest critic of use-segregated suburbs. See e.g., Lewis Mumford, *The Culture of Cities* (New York: Harcourt Brace, 1938), p. 485. See also Frederick, "Is Suburban Living a Delusion?" *Outlook* 148 (February 22, 1928): 290; Mumford, "The Wilderness of Suburbia" 28 *New Republic* (September 7, 1921): 44-45. While Jacobs' ideas have not captured the planning profession, her book is standard reading in city planning courses, and has substantial popular support. See John Mixon, "Jane Jacobs and the Law—Zoning for Diversity Examined" 62 *Northwestern University Law Review* (1967): 314, 320. See also August Heckscher, *Open Spaces: The Life of American Cities* 32 (1977). For reinforcement of the idea that mixed uses can benefit neighborhoods and help curtail excessive automobile usage, see, e.g., Kevin Lynch, *A Theory of Good City Form* (Cambridge, MA: MIT Press, 1981), pp. 248, 250, 264, 268-74, 406, 413. For other planning literature considering Jacobs' controversial arguments for integration of land uses, see e.g., Gans, pp. 25-33; Donald Appleyard and M.S. Gerson, *Livable Streets* (Berkeley: University of California Press, 1981) pp. 3, 4, 35, 51, 70, 74, 96, 245, 247.

[16]See Robert C. Ellickson and A. Dan Tarlock, *Land Use Controls: Cases and Materials* (Boston: Little Brown, 1981), pp. 559-63, concluding, on p. 563, n. 4, that "there is obviously little solid information on how various land uses affect the value of neighboring property." For studies suggesting no strong correlation between the value of single-family residentral lots and the presence nearby of mixed uses are John P. Crecine, Otto A. Davis and John E. Jackson, "Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning" 10 *Journal of Law and Economics* (1967): 79; Steven M. Maser, William H. Riker and Richard N. Rosett, "The Effects of Zoning and Externalities on the Price of Land" 20 *Journal of Law and Economics* (1977): 111. See also Note, "Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative" 45 *Southern California Law Review* (1972): 335, 350-52. For studies suggesting, on the other hand, that nearby nonsingle-family residence uses diminish values of single-family residences, see Ronald N. Lafferty and H.E. French III, "Community Environment and the Market Value of Single-Family Homes" 21 *Journal of Law and Economics* (1978): 381; William J. Stull, "Community Environment, Zoning, and the Market Value of Single-Family Homes" 18 *Journal of Law and Economics* (1975): 535. See also Robert H. Consigny and Zigurds L. Zile, "Use of Restrictive Covenants in a Rapidly Urbanizing Area," *Wisconsin Law Review* (1958): 612, 623, 631. The conflict in these authorities derives from difficulties in isolating price effects of surrounding uses versus other characteristics (such as house or lot size, tax rates, the quality of public services, and access to employment and commerce), and the relative impacts of offsetting advantages and disadvantages of a particular nearby use. See Stull, pp. 536-37; Ellickson and Tarlock, pp. 562-63, n.2.

[17]See notes 1, 2 and 5.

[18]See generally Wayne S. Hyatt, *Condominiums and Home Owners' Associations* (Colorado Springs: Shepards/McGraw Hill, 1985), Sections 1.05, 9.01, 9.04, 9.06, 9.07, 9.14, 10.13. In a section titled "Developer-Appointed Boards Should Actively Lead the Owners," Hyatt notes: "Most people, by obvious logic, are followers in most aspects of their lives—some in virtually all respects. Social order would not be obtained without that condition. It is fairly easy for the developer to create a relationship with the community whereby the overwhelming majority of the residents will accept the leadership of the developer appointed board of directors over the offered leadership of avocational dissidents in the community. Clearly, the developer must avoid the appearance of selecting a leader. However, having identified a potential leader (avoid young lawyers and retired colonels), the developer should subtly afford him or her an opportunity to participate in the ongoing activities of both stage-setting and operational nature." Id. at Sec. 10.15. For additional recognition of the developer's control in designing the typical association-administered servitude regime, see Uriel Reichman, "Residential Private Governments: An Introductory Survey" 43 *University of Chicago Law Review* (1976): 253, 260-62, 286-91; Stephen E. Barton and Carol Silverman, "Common Interest Homeowners' Associations: Private Government and the Public Interest Revisited," *Public Affairs Report*, March, 1988; Norman Geis, "Beyond the Condominium: The Uniform Common Interest Ownership Act" 17 *Real Property Probate and Trust Law Journal* (1982): 757, 773. By ownership of unsold lots, and often by special governance provisions binding the servitude regime during the development period, the developer often also retains control over the servitude regime until fairly late in the sales period. See "Residential Associations and the Concept of Consensual Governance" 9 *George Mason University Law Review* (1986): 91, 99-100.

[19]See generally 2 A.L.P., sec. 9.30.

[20]Servitudes are often largely boilerplate language. See e.g., Mike Bowler and Evan McKenzie, "Invisible Kingdoms" 5 *California Lawyer* (December 1985): 55, 58. See also telephone interviews by Nathan Simmons with Stephen E. Barton, University of California at Berkeley, Institute of Urban and Regional Development, July 27 and August 3, 1987 (on file with author), noting that, although most of California's estimated 13,000 to 16,000 common interest associations govern fewer than 50 units, they often use servitude documentation originally designed for large associations. A handful of private publications have been very influential in recommending specific servitude language. See e.g., Wayne S. Hyatt, *Condominiums and Home Owner Associations: A Guide to the Development Process* (Chicago: American Bar Association, 1985); Patrick Rohan, *Homeowner Associations and Planned Unit Developments*; D. Wolfe, *Condominium and Homeowner Associations that Work* (1978). For an earlier publication that has influenced many later drafting recommendations, see Urban Land Institute, *The Homes Association Handbook, Technical Bulletin No. 50* (Washington, DC: ULI, 1964, 1966, 1970 editions).

[21]See R. Jeff Andrews, "A Proposed Common Interest Community Act" 55 *Florida Bar Journal* (1981): 144, 146. See interviews by Nathan Simmons with Jeff Morrison, Subdivision Appraiser, U.S. Department of Housing and Urban Development, Denver Office, July 14, 15, 1987 (on file with author), confirming that HUD recommends to

developers that they follow "to a T" the servitude language in appendices to applicable HUD handbooks (Nos. 4140.3, 4265.1, and 4135.1 for subdivisions, condominiums and planned unit developments, respectively), in order to streamline governmental review of documentation of projects for which FHA, HUD, FNMA, FHLMC or VA financing may be sought. According to Morrison, the majority of developers use language identical to that recommended in these HUD forms. See also letter of Professor James Geoffrey Durham, February 26, 1988 (on file with author), noting that CC&Rs drafted for San Francisco Bay Area developers Durham represented "reeked of language we knew would satisfy the California Department of Real Estate, FNMA and FHLMC. That did not leave a lot of room for creativity."

[22]See Karl N. Llewellyn, Book Review: "The Standardization of Commercial Contracts in English and Continental Law" 52 *Harvard Law Review* (1939): 700-701; Trebilcock and Dewees, "Judicial Control of Standard Form Contracts," in P. Burrows and C. Veljanovski, eds., *The Economic Approach to Law* (1981): pp. 93, 95-96; Posner 3d, p. 102. See also Friedrich Kessler, "Contracts of Adhesion—Some Thoughts about Freedom of Contract" 43 *Columbia Law Review* (1943): 629, 632. Victor P. Goldberg, "Institutional Change and the Quasi-Invisible Hand," 17 *Journal of Law and Economics* (1974): 461, 484-85; W. David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" 84 *Harvard Law Review* (1971): 529, 530.

[23]Alan Schwartz and Louis L. Wilde, "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis" 127 *University of Pennsylvania Law Review* (1979): 630, 638-39.

[24]A potential marginal consumer purchasing property bound by servitudes has little buys from either a developer required to reject changes from preordained uniform restrictive scheme or a lot owner bound by servitudes he cannot alter. With increased standardization of servitude regimes, a marginal consumer confronts uniformity not only within developments, but across larger markets.

[25]Servitude enforcement rights are typically distributed widely, making negotiation for reasonable enforcement unworkable. In the typical residential setting, neighbors are unlikely to approach enforcement questions with a developer's or good supplier's business-like perspective.

[26]Some servitude regimes obviate the need for unanimous assent to modification of servitudes by permitting modification by majority vote of the owners. Such modification provisions vary widely, and are not generally prerequisites to servitude enforceability. While majority vote modification addresses holdout inefficiencies, assembly of a voting majority to support a proposed change poses its own substantial costs. Owners whose use preferences vary from those of the majority may have little prospect of negotiating servitude modifications with hundreds of fellow owners. In such cases, the unmodified servitudes—though desirable to a majority of owners—may combine with the growing uniformity of restrictions to leave minority preferences unmet throughout a given residential market. And servitude modification will remain subject to inefficiencies of holdout strategic bargaining.

[27]Some types of servitude obsolescence would seem to be almost inevitable over several decades, triggered by changes in the relative values of conflicting uses. See e.g., Rahenkamp, "Land Use Management: An Alternative to Controls," in Robert Burchell and David Listokin, eds., *Future Land Use* (New Brunswick: Rutgers, Transaction, 1975), p. 191. Such a shift in land use values can be triggered, for example, by increased energy and transportation costs, which render segregation of residences from food and other markets far less desirable than such segregation was 30 years ago. See e.g., Robert R. Wright and Morton Gitelman, *Cases and Materials on Land Use*, 3rd edition (St. Paul: West Publishing, 1982), pp. 1277-1283.

[28]Posner 3d, p. 59.

[29]Stewart E. Sterk, "Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions" 70 *Iowa Law Review* (1985): 615, 629-30. See also Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" 85 *Harvard Law Review* (1972): 1089, 1106-07. See also Margaret Jane Radin, "Time, Possession, and Alienation" 64 *Washington University Law Quarterly* (1986): 739, 755-56.

[30]If injunctive relief were unavailable for servitude breaches, an "efficient breach" could effect nonconsensual "purchase" of the servitude wherever the value to an owner of freedom from a servitude is greater than damages imposed by the breach. See Posner 3rd, p. 60; Calabresi and Melamed, p. 1107.

[31]This doctrine provides a defense to enforcement of a promissory servitude, due to changes affecting the land subject to the restrictions, and unanticipated by the original covenanting parties, where the promissory servitudes no longer serve their original purposes as a result. See Restatement of Property, Introductory Note to Chapter 46 (Running of Benefits) Sec. 564 (1944). See generally 2 A.L.P., Secs. 9.22, 9.39.

[32]See, e.g., Posner 3rd, p. 60; Susan F. French, "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands" 55 *Southern California Law Review* (1982): 1261, 1313-14, 1316-18; Uriel Reichman, "Toward a Unified Concept of Servitudes" 55 *Southern California Law Review* (1982): 1179, 1233, 1258-59.

[33]See, e.g., "Comment, Removing Old Restrictive Covenants—An Analysis and Recommendation, 15 *Kansas Law Review* (1967): 582, 584-85.

[34]As many as 85 percent of homebuyers are unaware of the existence and role of applicable servitudes or owners associations when they purchase properties in servitude regimes, or until an issue of servitude violation arises. See Simons-Morrison Interviews. See also letter of Susan F. French, December 10, 1987 (on file with author, in which the Restatement of Servitudes Reporter notes that most owners—and even most association board members—in her community's nearly 1,000-unit servitude regime "did not even know that we had CC&R's that imposed architectural control"). Interview by Nathan Simmons with Joe Hofmann, Senior Deputy, Technical Section, Subdivisions, California Dept. of Real Estate, July 23, 1987 (on file with author).

A more optimistic opinion was expressed by a Florida state regulatory official, regarding the impact of Florida condominium regulation requiring provision of a simplifying prospectus to prospective condominium purchasers in projects larger than 20 units. Interview by Nathan Simmons with Alex Knight, Division of Florida Land Sales, Bureau of Condominiums, Florida Dept. of Housing, July 27, 1987 (on file with author). But see Note, "Judicial Review of Condominium Rulemaking" 94 *Harvard Law Review* (1981): 647, 650-51 and authorities cited therein, questioning the effectiveness of disclosure statements.

[35]For cases stretching to find constructive notice of servitudes, see, e.g., Finley v. Green, 303 Pa. 131, 154 A. 299 (1931); Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496

(1925); Turner v. Brocato, 206 Md. 336, 111 A. 2d 855 (1955). See generally R. Cunningham, W. Stoebuck and D. Whitman, *Property* (St. Paul: West Publishing, 1984), pp. 503-504; Lawrence Berger, "A Policy Analysis of Promises Respecting the Use of Land" 55 *Minnesota Law Review* (1970): 167, 201-02.

[36]See e.g., John C. Payne, "A Typical House Purchase Transaction in the United States" 30 *Conv. and Property Lawyer* (1966): 194, 200; R. Jeff Andrews, "A Proposed Common Interest Community Act" 55 *Florida Bar Journal* (1981): 144, 145-46. See also Barton and Silverman, *Private Government/Public Interest*, p. 12; Simmons-Morrison interviews.

[37]See, e.g., "Report of Special Committee on Residential Real Estate Transactions of the American Bar Association," reprinted in 14 *Real Property Probate and Trust Law Journal* (1979): 581, 594; Note, "Judicial Review of Condominium Rulemaking" 94 *Harvard Law Review* (1981): 647, 651; Leo Fishman, "Role of Lawyer and Organized Bar in Real Estate Transactions" 9 *Real Property Probate and Trust Law Journal* (1974): 551; Payne, note 30.

[38]For examples of recent legal scholarship exploring the law's solicitude for inaccurate projections of self-interest over time, see e.g., Stewart E. Sterk, "The Continuity of Legislatures: Of Contracts and the Contract Clause" 88 *Columbia Law Review* (1988); Kronman, "Paternalism and the Law of Contracts" 92 *Yale Law Journal* (1983): 763, 778-86; Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, MA: Harvard University Press, 1986), pp. 235-41.

[39]Our everyday experience suggests that consent to contractual relations may, for example, include the desire to structure one's life according to external dictates—and thereby, as a goal in itself, to renounce some degree of one's own future autonomy. See generally, Robin West, "Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Vision of Franz Kafka and Richard Posner" 99 *Harvard Law Review* (1985): 384. Compare Posner, "The Ethical Significance of Free Choice: A Reply to Professor West" 99 *Harvard Law Review* (1986): 1431, and West, "Submission, Choice, and Ethics: A Rejoinder to Judge Posner" 99 *Harvard Law Review* (1986): 1449. See also R. Sennett, *Uses of Disorder* (New York: Random House, 1971), pp. 32-33, 40, noting some suburban neighbors' tendency to inaccurately project community solidarity, and criticizing the "myth of community purity," especially strong in affluent suburban America, as "pursuit of a desire for coherence" by people who "actively seek their own slavery and selfrepression"; Erich Fromm, *Escape from Freedom* (New York: Harper, 1941), pp. 108, 134.

[40]See e.g., O'Connor v. Village Green Owners Association, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983); White Egret Condominium v. Franklin, 379 So. 2d 346 (Fla. 1979); Adrian Mobile Home Park v. City of Adrian, 94 Mich. App. 194, 288 N.W. 2d 402 (1979); Coquina Club, Inc. v. Mantz 342 So. 2d 112 (Fla. App. 1977); Riley v. Stoves, Ariz. App. 223, 526 P. 2d 747 (1974); see generally Note, "The Enforceability of Age Restrictive Covenants in Condominium Developments" 54 *Southern California Law Review* (1981): 1397; Gregory M. Travalio, "Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age Restrictive Housing" 40 *Ohio State Law Journal* (1979): 295; Mary Doyle, "Retirement Communities: The Nature and Enforceability of Residential Segregation by Age" 76 *Michigan Law Review* (1977): 64. Recent amendments to the federal *Fair Housing Act* extend the antidiscrimination provisions of the Act to bar discrimination based on "familial status, defined as children under 18 living with their parent or person with legal custody, or their designee." See 42 V.S.C. 3601, et. seq.

[41]See, e.g., Taormina Theosophical Community, Inc. v. Silver, 140 Cal. App. 3d 964, 190 Cal. Rptr.38 (1983); State v. Celmer, 80 N.J. 405, 411, 404 A.2d 1, 3-4 (1979).

[42]See, e.g., Chianses v. Culley, 397 F. Supp. 1344 (S.D.Fla. 1975).

[43]See, e.g., Jayno Heights Landowners' Association v. Preston, 85 Mich. App. 443, 271 N.W.2d 268 (1978); Green v. Greenbelt Homes, 232 Md. 496, 194 A.2d 273 (1963); see also Annot., 71 A.L.R.3d 693, 725-35.

[44]See, e.g., Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills, 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982), appeal dismissed, 459 U.S. 1192 (1983).

[45]See, e.g., Rhue v. Heyenne Homes, 168 Colo. 6, 449 P.2d 361 (1969).

[46]See, e.g., McNamee v. Bishop Trust Co., 62 Hawaii 397, 616 P.2d 205 (1980) (requiring approval "of any alteration [costing] in excess of $1,000." See also Louv, p. 109 (1983): Community associations often control the color of units or houses, who can use the pool, what kind of trees can be planted, what boulders can be moved, or even the color of the curtain liners. The associations in many condos fine residents for taking their trash out during daylight hours. In Florida, a woman was fined for hanging an American flag on her balcony—no hanging objects were allowed on balconies. See generally, Uriel Reichman, "Residential Private Governments: An Introductory Survey" 43 *University of Chicago Law Review* (1976): 253, 269-70. See also Note, "Residential Associations and the Concept of Consensual Governance" 9 *George Mason University Law Review* (1986): 95-96; see also Simmons-Kleine interview, suggesting that typical servitude regimes allow "nothing" to be done without permission of the architectural review committee.

[47]See, e.g., Westhill Colony, Inc. v. Sauerwein, 78 Ohio L.Abs. 340, 138 N.E.2d 404 (Ct. App. 1956).

[48]See Kirkley v. Seipelt, 212 Md. 127, 128 A.2d 430 (1957).

[49]See, e.g., Inwood North Homeowners' Association v. Meier, 625 S.W.2d 742 (Tex. Civ. App. 1981).

[50]See *Washington Post*, January 5, 1986.

[51]See University Gardens Property Owners Association v. Solomon, 88 N.Y.S.2d 789 (Sup. Ct. 1946), 18 A.L.R. 3d 853.

[52]See, e.g., the balcony enclosure restrictions of the Park Lane Condominium (Denver, Colorado) which specify the thickness of plexiglass down to the sixteenth of an inch, and the exact type of placement of "self-tapping screws."

[53]See, e.g., Allegro v. Home Owners of Edgewood Hills, 35 Del.Ch.543, 122 A.2d 910 (1956), in which the architectural review was guided only by "suitability" and "harmony" of the building and materials. Compare Shashall v. Jewell, 228 Or. 130, 363 P.2d 566 (1961).

[54]See, e.g., 620 Davis v. Huey, S.W.2d 561, at 563 (Tex. 1981); Kies v. Hollub, 450 So.2d 251 (Fla. Dist. Ct. App. 1984). Unlimited review criteria can powerfully slant negotiations against the property owner proposing an alteration, and occasional decisions hold standardless review provisions void for vagueness. See, e.g., Lake Forest, Inc. v. Drury, 352 So.2d 305 (La. App. 1977), writ den., 354 So. 2d 199 La. (1978).

[55]The 1987 Barton and Silverman California study reports that 45 percent of the surveyed community associations found significant member dissension, with fully 44 percent of the associations reporting either board member harass-

ment at association meetings, or the threat or actually commencement of a lawsuit against the association in the past year alone. In this same study, 41 percent of associations surveyed reported major problems with at least one type of servitude violation; among these, "unauthorized changes in dwelling units" were the most intractable. Barton and Silverman conclude that servitude enforcement "places major strains on the neighbor relationship" pp. 23-24. See also Simmons-Hofmann interview. See also S. Williamson and R. Adams, *Dispute Resolution in Condominiums: An Exploratory Study of Condominium Owners in the State of Florida* (Jacksonville: University of North Florida, College of Business Administration, 1987), describing "[c]onflict and disputes among condominium residents and between residents and their respective [condominium owners associations]" as "common," (page 68), concluding that this conflict and stress, and community associations' ineffective responses, threatening "a serious decline in condominium development [in Florida] as the quality of condominium life deteriorates" (page 4).

In extreme cases, conflicts among neighbors trigger actual or threatened violence. See, e.g., Button, "Condominiums: Welcome to the Board," *Money* (October, 1982): 191; Gary A. Poliakoff, "Conflicting Rights in Condominium Living," *Florida Bar Journal* (1980): 756. See also *Florida Times Union*, November 15, 1986; Barton and Silverman, *Private Government/Public Interest*, p. 16.

In an early 1970s Urban Land Institute survey of 49 California and Washington, DC, servitude regimes, Chester Norcross characterized residents as "unhappy, resentful, discouraged, and disillusioned about their associations," with "[a] considerable number of families . . . so angry that they are selling their homes and moving away, . . . to get away from what they think of as straightjacket controls on their 'ives." C. Norcross, *Townhouses & Condominiums: Residents' Likes and Dislikes* (Washington, DC: ULI, 1973), p. 80. Representative resident quotes in the 1973 ULI report direct far more resentment toward association enforcement of servitude restrictions than toward association dues obligations (pp. 81-84).

[56]These figures are based on several searches of successive five-year blocks of the Westlaw "Allstates" database of appellate state courts (including DC, but excluding courts in some states prior to 1965). A more detailed report of results of these searches is on file with the author. Of course, appellate decisions reflect only a small fraction of actual servitude regime litigation, and an even smaller fraction of association conflict. Though servitude regimes proliferated during the same period as this litigation explosion, the rate of increase for appellate litigation—which in any case lags several years behind neighborly conflict within servitude regimes—outstrips the proliferation of associations. At a minimum, mushrooming servitude regime litigation suggests that the growth of such regimes is ineffective to calm neighborhood conflict.

[57]Barton and Silverman, California study, p. 13.

[58]See, e.g., Posner 3rd, p. 59. See also Robert Wright and Morton Gitelman, pp. 1277-87; Rabenkamp, "Land Use Management: An Alternative to Controls," in Burchell and Listokin, eds., *Future Land Use*, p. 191.

[59]See generally Margaret Jane Radin, "Market Inalienability" 100 *Harvard Law Review* (1987): 1849, especially 1860, 1897; Robert D. Sack, *Human Territoriality: Its Theory and History* (New York: Cambridge University Press, 1986) pp. 71-80, 84-91, 99-100.

[60]See generally Radin, "Market Inalienability" especially p. 1908; Radin, "Property and Personhood" 34 *Stanford Law Review* (1982): 957, especially 987-88, 991-1002; Sack, especially p. 195; Rakoff, "Ideology in Everyday Life: The Meaning of the House" 7 *Politics and Society* (1977): 85. See also Rollo May, *Love and Will* (New York: W.W. Norton, 1969), pp. 186-87, and *Man's Search for Himself* (New York: W. W. Norton, 1953), pp. 13, 22.

[61]See also Sterk, "Freedom from Freedom," p. 633; Epstein, "Freedom of Contract in Servitudes," pp. 1361-63.

[62]These proposals will be set forth more fully in Winokur, "The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty and Personal Identity," *Wisconsin Law Review* (1989): 1.

[63]This limitation creates enforcement groupings of 12 or fewer, corresponding to the definition of "planned communities" to which the uniform planned community act would apply. *Uniform Planned Community Act*, Sec. 1-102(a). But this precise number is far less important than the underlying concept of strictly limiting the enforcement group for older servitudes.

In condominium and other developments where the physical structure places housing units particularly close together—as in apartments in a single building—the determination of an appropriate size for the enforcement group becomes more difficult. In those denser servitude regimes, determination of maximum enforcement group size would balance the greater number of units close enough to impact each person's home against the need for each enforcement group to enable meaningful servitude negotiations to alter or lift restrictions. This proposal does not exclude the possibility of the owners or condominium association acting as enforcement agent beyond the initial 20-year term. However, association enforcement beyond the initial term could be only at the behest of owners of lots within the smaller enforcement group.

[64]The respective enforcement groups would be both reciprocal and mutually exclusive, with each lot in a group holding enforcement power against the same lots which can enforce against it, and no lot belonging to more than one enforcement group.

[65]See note 37.

*Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance**

Marc A. Weiss
School of Architecture and Planning, and Center for Real Estate Development MIT
John W. Watts
Research Assistant
Lincoln Institute of Land Policy

Introduction

The number of residential community associations (RCAs) has grown tremendously in the past two decades. Most of them have a very short history. A large number of the recent ones are condominium associations. Since residential condominiums were first introduced as a new form of property ownership in the United States during the 1960s, there is no real American precedent for the condominium association as a distinct organizational structure. Homeowner associations, on the other hand, have a longer tradition in this country, going back at least several generations.

The history of the initiation and diffusion of homeowner associations is closely interconnected with the rise of the community builders, the large-scale real estate developers who have played a key role in shaping the process and pattern of modern residential development in the United States. Community builders were pioneering innovators of homeowner associations during the past century, and they continue to be strong advocates for improving association financing and management.

Community builders have created and supported community associations to accomplish three main purposes: (1) to establish a mechanism for effectively enforcing and adapting deed restrictions over the long term; (2) to develop and maintain open space, common areas, recreational facilities, and other privately owned infrastructure and amenities; and (3) to provide services for the property owners and residents.

During the past century, community builders have established RCAs increasingly as a vital element in the process of developing long-term,large-scale residential neighborhoods. Major developers like J.C. Nichols of Kansas City discovered that homeowner associations were an important method

---

* This paper is drawn primarily from Marc A. Weiss, *The Rise of the Community Builders: The American Real Estate Industry and Urban Land Planning* (New York: Columbia University Press, 1987); see also references listed in the bibliography.

of stabilizing land uses and property values in a new community. Through these associations, residential developers have reduced the long-term risks of building new neighborhoods, and have thus been able to invest greater amounts of money into creating and maintaining a wide range of community facilities and design amenities. Community builders have learned first hand the widespread market appeal of homeowner associations, organized with automatic membership written into the deeds covering the property, financed by compulsory fees on the owners, and managed by a professional staff under the direction of the developers and a representative board of residents.

In order to maximize the market appeal of a new development, particularly over a period of years, residential developers must be able to assure prospective home buyers that a competent organization will vigorously enforce the deed restrictions, maintain the common facilities, and provide the needed services after all the property has been sold or leased and the developer has departed from the scene. RCAs help fulfill the developer's promise to protect and enhance property values in the community over the long term.

The community builder who utilizes RCAs also faces a fundamental dilemma: how much control should the developer retain, and for how long? On the one hand, developers need to control the association closely enough to guarantee that it enforces restrictions properly, maintains facilities, and provides services, especially until all the property is sold. This ensures that the sales team will be able to market the proper community image for the present and the future.

On the other hand, developers must soon turn over the association to the homeowners' control in order to give them a stake in the community, to increase purchaser satisfaction, and to establish a pattern of resident involvement that is critically necessary for the long-term effectiveness of the association's management. New RCAs are almost always established with formal procedures for transferring control from the developers to the property owners and residents.

The Rise of the Community Builders

When we think of the image of a "builder," we imagine someone who puts together a physical structure. The image of a "community builder" concerns the land patterns in which the structures are placed and the relationship of the structures to one another. A community builder designs, engineers, finances, develops, and sells an urban environment, using as the primary raw material rural, undeveloped land. In the parlance of the real estate industry, such activity is called the platting and improvement of subdivisions.

As one land and housing developer stated in 1936, "Fundamentally, the subdivider is the manufacturer in the field of real estate practice."

The history of the last century in American real estate consists of three key trends: (1) the increasing growth in the average scale of development and the size of the land parcel; (2) the increasing sophistication in the scope and quality of the structural improvements to land and buildings; and (3) the increasing economic coordination and integration in the phases of the development process by the entrepreneurs.

In residential real estate development, of which RCAs are such a crucial component, the most important aspect of the history over the past century is the "creation of the modern residential subdivision." That an urban land subdivision could be considered "residential" during the initial platting stages was a very unusual concept in late 19th and early 20th Century America. Most urban land had previously been carved into building lots and sold for whatever uses the new owners intended. Subdividing land exclusively for residential purposes presupposed a level of planning and control that was certainly not the norm for American urbanization.

Planning and developing specifically for residential districts or neighborhoods was first utilized by large-scale developers in the case of high-income suburban communities. The technological and economic changes that made possible spatial separation of urban land uses were combined by the developers with substantial investment in landscaping and infrastructure improvements and legal use of deed restrictions to control and preserve a planned environment.

Creating residential subdivisions for builders and purchasers of expensive single-family houses represented the first phase of the modern transformation of urban land development by private real estate entrepreneurs. This phase, "changes at the high end," began in the 1830s and reached maturity during the 1920s. The second phase, "changes at the moderate end," completed the revolution in community building by the 1940s. In this phase, subdividers became full-fledged suburban housing developers, not only planning and improving large tracts of land, but building the houses on the lots and selling the completed package to the home buyer. Often, parks, schools, shopping centers, and other community facilities were also built.

What made the Levittown developments of the late 1940s so important was not just that the Levitts had found a way to mass produce affordable housing for home ownership, but that the housing was an attractive investment for young families precisely

because of the planning, construction, and long-term maintenance of a complete community. Even where smaller subdividers and home builders created only modest-sized neighborhoods, what the average consumer was purchasing or renting by the 1950s was a new dwelling in a new district of completed dwellings, rather than a vacant lot in an undeveloped area with an uncertain future. By the 1950s, automatic membership homeowner associations were beginning to play an increasingly important part in this process of community building, and they have expanded both in numbers and complexity in every decade since.

Residential developers who engaged in full-scale community building also performed the function of being private planners for American cities and towns. Working together with professional engineers, landscape architects, building architects, and other urban designers, these real estate developers worked out "on the ground" many of the concepts and forms that came to be accepted as good community planning.

Numerous physical and legal features were first introduced by private developers and later adopted as rules and principles by government agencies. Among those features were: the classification and design of major and minor streets, the superblock and cul-de-sac, planting strips and respect for rolling topography, arrangement of the house on the lot, lot size and shape, set-back lines and lot coverage restrictions, planned separation and relation of multiple uses such as commercial and institutional areas, ornamentation, easements, underground utilities, and design and placement of open space and recreational amenities (among them, parks, playgrounds, golf courses, swimming pools, tennis courts, lakes, country clubs, sports centers, schools, meeting centers, and biking and hiking trails).

Developers' desire to finance, develop, and maintain a wide range of common amenities that gave the community its distinctive character and long-term market value led them to establish RCAs. This phenomenon of "private innovation preceding public action" also applied to the provision of vital community services, which developers often initiated and implemented through homeowner associations, sometimes later turning to local government, other times continuing with private services.

One method by which community builders have implemented their planning and design vision, in addition to direct capital investment and administrative coordination of the investment, improvement, and sales process, is through the vehicle of legally enforceable deed restrictions (now called CC&Rs—conditions, covenants, and restrictions). These restrictions, written into a private contract between the original seller and buyer of a building lot, both mandate and prohibit certain types of behavior on the part of present and future property owners.

Deed restrictions, by virtue of being voluntary private contracts, often go far beyond the scope of public sector regulations. These restrictions, which might even include prohibiting a homeowner from repainting the house with a different color, constitute a very significant abridgment of private property rights. That they were willingly and in many cases eagerly accepted by home purchasers opened the way for the introduction and extension of public land-use controls. More importantly, it was the need for strict but flexible long-term enforcement of deed restrictions that provided part of the initial impetus for the creation of automatic membership homeowner associations.

The Five Historical Periods

In examining the history of RCAs, we have discovered five distinct periods:

Origins (1830-1910). During this period the modern community association did not really exist. Some subdivisions did have deed restrictions and attempted to enforce them, and some private property owners' neighborhood organizations did provide basic services and own and maintain common facilities, but no compulsory membership homeowner association was constituted through deed restrictions to perform all three of the basic functions of a community association.

Emergence (1910-1935). In the 1910s and especially the 1920s, the larger scale of high-income suburban subdivision development, and the increased demand for design amenities and sophisticated restrictions, created a greater need for developers to provide for the establishment of homeowner associations. At this time, these associations were generally not standardized and were relatively few in number.

Popularization (1935-1963). Community builders began standardizing homeowner associations, working primarily through the Community Builders' Council of the Urban Land Institute (ULI), and later through the National Association of Home Builders (NAHB). In the 1940s, the ULI strongly endorsed the use of homeowner associations by developers, and published a plan for standardized implementation. At the same time, the Federal Housing Administration (FHA) was strongly promoting the use of deed restrictions in community development, paving the way for homeowner associations as the long-term enforcement mechanism.

Expansion (1963-1973). The FHA and ULI worked together to promote the widespread use of community associations in planned unit developments (PUDs) and in residential condominiums. The latter were first introduced into the U.S. with FHA approval in 1961. During this period of rapid expansion, many of the community associations were

poorly organized, often by much smaller scale developers. This led to a good deal of resident dissatisfaction.

Restructuring (1973-1989). Developers recognized the growing difficulties with community associations, and organized to take action. In 1973, ULI and NAHB got together to support the formation of the Community Associations Institute (CAI). The purpose of CAI is to promote more effective management of residential community associations.

Since the mid-1970s, developers increasingly have utilized professional firms to work with the resident board members in managing community associations. In addition, many developers have been downsizing community associations—reducing basic amenities and offering more optional packages to cut the required fees and budgetary costs.

The FHA and the Veterans Administration (VA) played an important role in standardizing the implementation of community associations from the 1930s to the 1960s through their mortgage insurance and guarantee functions. Beginning in the late 1970s, two key secondary mortgage market institutions, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) have been very influential in the process of restructuring community association organization, financing, and management to conform to new implementation guidelines. Finally, in the past decade developers have been relinquishing more control of community associations to the property owners at earlier stages, as part of a phased process.

The unique contributions of each of these five historical periods to the development of RCAs are described in following sections of this paper.

Period One: Origins (1830-1910)

During the 19th century, urban land developers began changing from the subdividing of raw land to the more complex practices of subdivision development. This involved primarily the installation of improvements, and in some cases also the construction of houses. The higher income subdivisions experimented with extensive landscaping and amenities, as well as with deed restrictions concerning the development and uses of property. Most of the restrictions were for 5 to 15 years, not long enough to warrant the establishment of an association for enforcement. The main enforcement mechanism was for neighboring property owners with the same restrictions to sue violators in civil court.

There were several problems with this method of enforcing restrictions. First, it left enforcement to chance. If none of the property owners had the time, money, or initiative to sue, then the violation would proceed unchallenged. Second, by the time a civil suit got to court the violations may have already done their damage. Reversing such trends might be difficult and costly—courts were hesitant to intervene in such situations and were more likely to declare the restrictions no longer applicable.

The general pattern in rapidly urbanizing areas was for low density residential subdivisions to become higher density residential or commercial-industrial neighborhoods within two decades. Most property owners anticipated such changes and did not expect deed restrictions to fix the character of the community for more than 10 or 15 years. People expected to move frequently to keep up with the latest fashions in houses and neighborhoods. The restrictions, though limited both in duration and effectiveness, were used in high-income subdivisions to help stabilize this process of change.

Basic services were sometimes provided by neighborhood improvement associations. These services were provided on an interim basis, to fill the gap between the initial development and incorporation or extension of infrastructure and services by local government. As such, these activities differed from the long-term private responsibilities of an automatic membership homeowner association, while still serving as a forerunner.

Another early precedent was the development of private streets in St. Louis and other cities. The maintenance of the streets and enforcement of restrictions were administered by perpetual trustees appointed by the developers, rather than by a resident-elected board under the community association model. Many of the private streets associations were in decline by 1910, and their popularity waned in the 20th Century. Most of the modern homeowner associations are organized in subdivisions with public streets.

Finally, there were some other early examples of private places and homeowner associations outside St. Louis. Two of the most notable were Gramercy Park in New York, which formed a homeowner association in 1831, and Louisburg Square in Boston, which formed an automatic membership homeowner association in 1844.

Period Two: Emergence (1910-1935)

During the 1910s and especially the 1920s, developers of increasing numbers of large and expensive suburban subdivisions began establishing more stringent and longer term deed restrictions that utilized homeowner associations for effective enforcement. Developers also created greater physical amenities and higher quality private services that required homeowner associations for administration and maintenance. These associations evolved on an experimental basis to accomplish the purposes of

enforcing restrictions, maintaining common property, and providing services to accommodate these newer forms and larger scale of residential subdivision developments.

Many technological and economic changes allowed greater spatial separation of land uses and enhanced stability for new neighborhoods. These changes were reflected in the increasing use of deed restrictions in subdivision development. By the 1920s, developers were placing restrictions on lots for an average duration of 33 years, more than double the average length of time from the pre-1910 period. Many of these newer restrictions contained renewal clauses, some by procedures for automatic renewal with the consent of most of the property owners. Blanket restrictions were written to "run with the land" covering the entire subdivision, so that lot owners could not individually refuse to renew the restrictions and then opt out of the system. Reinforcing these trends was a stronger judicial attitude favoring the enforcement of restrictions.

In most cases during this period, the formation of an RCA was not completely planned in advance, but evolved later. For example, the first homeowner association for the famous subdivision of Roland Park in Baltimore was formed in 1909, 18 years after the initial subdividing, development, and sales. Following this pattern, most of the early associations were established once the need to enforce restrictions, provide services, and maintain common facilities was fully recognized after the community was already partially developed and occupied.

By the 1920s many more of the deed restrictions included procedures for establishing an association, but not automatically. The developers and lot owners had to take some further actions later to initiate the formation of an association. One important exception was St. Francis Wood in San Francisco, which included in its 1912 deed restrictions a provision for an association to be created immediately.

In the 1920s some RCAs acquired additional power to collect mandatory assessments from property owners by gaining the legal authority to place a lien on the property in the event of nonpayment. This gave the association a stable source of funds with which to become more professionalized and effective in exercising its responsibilities. Most of the associations contracted with the developer for service provision and facility maintenance, establishing a tradition that has survived as an option for association management in the 1980s.

The Radburn (New Jersey) Citizens' Association, and the various homeowner associations of the Country Club District in Kansas City were among the most innovative during the 1920s and early 1930s, and served as models for the future growth of this institution. These associations were among the first to offer extensive recreational services, setting a precedent that later became the standard for many of the larger subdivision developments. The managers of the Radburn association, and the J.C. Nichols Company that provided the management for the Country Club District associations, also worked out an organized and tactful administrative style that was more effective in enforcing deed restrictions on a daily basis than the earlier reliance on lawsuits.

An additional innovation of this period was the introduction by developers of design controls and art juries. The previous method of including minimum house construction costs in the deed restrictions was not sufficient to guarantee architectural quality. Also, architectural tastes in the 1920s came to emphasize uniformity, which required greater regulation than the previous vogue of eclecticism. This was particularly the case in California, where the Spanish-style "Mission Revival" became popular and symbolic of a different way of life than the fashions familiar to migrants from the eastern and midwestern United States.

Rather than utilizing homeowner associations directly as the enforcement mechanisms, developers established art juries to administer the new design controls written into the deed restrictions. The art juries were small committees appointed by the developers in the early stages and often by the homeowner associations at a later point. Generally, the art jury members were design professionals such as landscape architects, building architects, and civil engineers. The rationale for this approach was that such professionals had more credibility and legitimacy to make tough and controversial decisions and a more reliable commitment to and expert understanding of the fundamentals of good design. Thus, they were regarded as a more preferable enforcer than either the developers, who presumably would withdraw from such efforts after all the lots were sold, or the property owners and residents, who might not be well organized or represented at the crucial early stages and who were considered to be less sophisticated about design issues. Nevertheless, the homeowner associations funded the art juries from their assessments budgets, and therefore still played a key role in the regulation of community design standards.

Period Three: Popularization (1935-1963)

Beginning in 1935 the newly created Federal Housing Administration, through its mutual mortgage insurance program, its land planning division, and its property standards and neighborhood standards, helped spawn a reorganization and revival of the residential subdivision development and home building industry. Subdividers became home builders on an increasingly larger scale as FHA insurance made greater amounts of financing available for

developers and builders, as well as more affordable financing for prospective home buyers.

This became the era of the rise of the community builders on a grand scale. The purchaser was now buying a fully completed house in an entire community of newly built houses and basic facilities, services, and amenities. In this environment, it was necessary for developers to control and maintain long-term stability regarding the quality, uses, and values of the properties.

In the age of community building, deed restrictions and homeowner associations became increasingly important and widespread. Home buyers were now purchasing a more extensive product, and thus expected higher values in return. Homeowner associations were considered desirable protection for the home buyers' investment. Also, home buyers were now moving in right away to the completed new houses, so the quality of the surrounding community became of more immediate concern. RCAs were seen as necessary to protect and enhance these surroundings.

FHA policies encouraged large-scale development, new subdivisions limited to residents with similar socio-economic characteristics, and the use of common facilities such as parks and playgrounds. FHA also strongly promoted the use of comprehensive deed restrictions and insisted that they be vigorously enforced, recommending that art juries be formed to administer design controls. FHA's land planning consultants assisted developers in designing the physical layout of subdivisions as well as the deed restrictions. All of these policies suggested the use of RCAs, though FHA did not require subdivision developers to establish such associations as a condition for obtaining mortgage insurance commitments. The Veterans Administration, which launched its home mortgage guarantee program in 1944, generally followed FHA's leadership in formulating development standards.

The growing number of large-scale community builders became increasingly convinced of the importance of homeowner associations as an essential element of residential subdivision development. In 1944, the Urban Land Institute formed a Community Builders' Council with J.C. Nichols as its chairman. From the very beginning, the Community Builders' Council strongly favored RCAs (called homes associations) and formulated standard principles for their implementation. At its first national meeting in June 1944, the council focused on the benefits of establishing RCAs to aid developers in the provision of services, and decided to explore association issues further.

In 1945, J.C. Nichols elaborated on the role of homeowner associations in *Mistakes We Have Made in Community Development*. ULI's first technical bulletin. The following year, ULI Assistant Director Max Wehrly wrote an article that spelled out basic principles for community builders with regard to homeowner associations. These included:

1) Provide for immediate establishment of a homeowner association in the deed restrictions (protective covenants), with company officials temporarily filling in as association directors until the resident directors are chosen.

2) Turn over control to the homeowners in an orderly manner and as quickly as possible, though not in the earliest stages.

3) Delegate design control to an art jury rather than to the homeowner association.

4) Establish recreational activities, including activities for children, as an important function of a homeowner association.

The basic approach outlined by Max Wehrly in 1946 was further reinforced by ULI's *Community Builders Handbook* published the following year. The ULI's solution to the developers' dilemma of retaining or relinquishing control of RCAs was to establish associations immediately and turn over control at an early stage, but to retain control over design review (through an art jury) at least until all the land had been sold.

The National Association of Home Builders was an organization formed in 1942 with a much larger and more diverse membership than ULI, ranging from huge community builders down to small individual house builders. NAHB adapted the ULI model of homeowner associations for "small operators." In 1950, NAHB published the *Home Builders Manual for Land Development*, essentially endorsing the ULI principles for the use of RCAs by developers, and encouraging smaller developers and builders to follow a variety of methods for establishing homeowner associations, despite difficulties due to their more modest scale of operations.

Period Four: Expansion (1963-1973)

The arrival of condominiums and planned unit developments (PUDs) during the 1960s marked a basic watershed in the history of RCAs. Both the condominium concept and the PUD concept required a community association to maintain the common areas. Consequently, as PUDs and condominiums became popular, the number of residential community associations nationwide jumped from fewer than 500 in 1962 to approximately 15,000 in 1973. The rapid spread of these new smaller scale forms of residential development shifted the basic purpose of RCAs during this decade. Associations increasingly stressed maintaining common property

and providing services, while enforcing deed restrictions became relatively less important.

PUDs and condominium developments burst onto the American housing scene in the 1960s because they presented the developer with lower per-unit costs and the ability to package recreational services and other amenities in sales of moderately priced homes. PUD site design lowered costs through more efficient layout of streets and utilities, and building only on the most suitable terrain. Through participation in community associations, residents could pool their resources to maintain green space as well as social and athletic facilities.

Thus, community associations in PUDs and condominium developments provided two basic advantages for the buyer: a "maintenance-free lifestyle" with numerous recreational opportunities, and a less expensive means of buying a home. Associations in these types of developments continued to enforce deed restrictions, but their essential purposes increasingly reflected two other priorities: the provision of attractive services and the economical maintenance of common property.

While developer organizations such as the ULI were indispensable in marketing the PUD and condominium concepts, the support of the federal government, especially the FHA, was also very important. In 1963 and 1964, FHA and ULI combined forces to publicize the PUD concept through two important documents, FHA's *Planned Unit Development with a Homes Association* brochure, which became a best seller among developers, and ULI's *Homes Association Handbook*, which circulated widely among urban planners. The close degree of FHA-ULI collaboration on these projects is illustrated by the fact that Byron Hanke, who headed land planning at FHA, was at the same time the principal author of ULI's Homes Association Handbook.

The federal government also played a major role in the rise of condominiums. Section 234 of the *National Housing Act of 1961* authorized FHA to insure mortgages on condominiums, and FHA immediately devised model state enabling legislation to allow for condominium conversion and development. In the 1960s, both the FHA and the VA attempted to devise a method for standardizing the critical process of transferring control of RCAs from the developers to the owners of the residential units. In projects with FHA-insured and VA-guaranteed mortgages, the developers retained a triple vote until 75 percent of the units were sold, at which point the developers formally relinquished majority voting control of the community association.

However, since RCA board members typically served for staggered three-year terms, developers could stack the transition board with loyal supporters and thereby prolong their influence for several years after the 75 percent transfer point. Furthermore, even if the individual unit owners did achieve actual majority control of the community association board, the transition was frequently anything but orderly. In many cases, developers had made little effort to train or even involve residents in community association governance prior to the transition period.

Since many developers were unfamiliar with the considerable complexities involved in managing the new PUD and condominium associations, a substantial number experienced major difficulties during the 1960s and early 1970s. A 1973 survey of 1,760 condominium residents found that RCAs had become a problem for the otherwise popular condominium concept. While a sizable majority of the respondents expressed satisfaction with their overall condominium experience, 61 percent rated their community association fair or poor.

Much of the difficulty during this period can be attributed to developer and resident unfamiliarity with PUD or condominium management, legal uncertainty in drafting association documents, and lack of appropriate state enabling legislation. Inexperience in RCA management was compounded in some cases by a lack of proper attention from developers. Particularly in many of the condominium and PUD townhouse projects, developers often delegated oversight of the newly created associations to junior staff, and neglected to keep necessary records, hold required meetings, or properly enforce rules and restrictions.

Period Five: Restructuring (1973-1989)

Since the mid-1970s, much of the growth in condominiums and PUDs has been in relatively small projects, often infill development in built-out neighborhoods. According to the 1988 edition of CAI's *Community Associations Fact Book*, there were approximately 130,000 RCAs in 1985, of which 70,000 were condominium associations. One California study documented that the median size in number of units of new residential community associations developed during the past decade was less than half the size of residential projects with community associations developed prior to 1976.

Smaller projects increasingly include common property primarily to reduce costs rather than to promote a maintenance-free or recreational lifestyle. Thus, in many small projects, RCAs have been created primarily for the maintenance of common property and less for the provision of extensive recreational services or enforcing deed restrictions.

The groups whose interests are represented by associations are also changing. Developers creating associations increasingly are responding to local governments' subdivision regulations rather than to the home buyers' interests. Some of the original

market-driven rationale for community associations has been lost.

Developers of small PUD and condominium projects have been finding that local subdivision regulations through a variety of incentives either require or encourage them to create commonly owned property managed by community associations. In some cases, localities refuse to accept public dedication of private streets, open space, or other common areas within a private development.

Even when developers are not required to retain ownership of these facilities, in many cases they still decide to do so in order to decrease the unit costs of the development. A variety of facilities—most notably streets, but also utility line construction, storm drainage, sewers, and erosion control—all can be built less expensively if the developers elect to have them managed privately instead of constructing them according to public standards. The RCA is then created by the developers chiefly to own and maintain these private facilities, which cost less to develop initially, but may cost more to repair and maintain over the long term.

While smaller PUD and condominium projects have become more numerous, larger residential developments have remained important, and frequently have come to require two levels of community association management. An umbrella or master association maintains the property and facilities common to the entire development, and often negotiates the provision of services for the smaller associations representing each part of the development. The smaller associations oversee whatever structures or properties are common to their own section. Relations between the master associations and the smaller associations may vary considerably.

In some large projects, the master developer does not build the homes, but sells the improved land in wholesale parcels to builders. In these cases the RCA must develop relations not only with an original developer but also with the builder of its section.

Since the early 1970s, when there was considerable resident dissatisfaction with RCA performance, developers have attempted to improve association management, particularly on problem areas such as financial shortfalls, expensive infrastructure repair, and lack of communication with residents. Two basic approaches characterize the majority of developers' actions. First, developers have accelerated their earlier attempts to standardize and professionalize association management and to formulate a detailed, uniform model for the transfer of control to residents. Second, in large as well as small projects, many developers have reduced the provision of amenities through the RCAs, in order to lower development costs and mandatory association fees.

Over the last decade, efforts to standardize association management have come not only from developers and developer organizations, but also from the Community Associations Institute, the courts, state government legislation, and federal government agencies. In the midst of the condominium explosion, when widespread association problems were becoming a serious concern to many developers, the ULI and the NAHB jointly formed the Community Associations Institute in 1973 to help solve these difficulties. Since its inception, CAI has published pamphlets establishing guidelines for association management and finance, and clarifying the appropriate roles of developers, lenders, buyers, and local public officials. Partly at the urging of the CAI, many developers have been professionalizing association management since the mid-1970s, either through hiring full-time executive directors, or through contracting with outside management firms to perform certain functions, particularly maintenance activities.

While FHA and VA have remained important in the formation and management of some community associations, the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation have recently become very powerful in influencing RCA standards through their positions as secondary market purchasers of residential mortgages, particularly of the rapidly expanding number of privately insured mortgages. Fannie Mae and Freddie Mac have adopted a series of requirements for the proper organization of community associations that must be fulfilled before they will purchase mortgage loans made on residential properties that utilize community associations. This is further recognition that an association can significantly affect the long-run value of a development, and that appropriate actions can help ensure greater price stability in market demand.

In the last five to ten years, developers have been more conscientious about implementing phased transfers of control to owner-residents. The CAI provided leadership for developers beginning in the 1970s by drafting detailed step-by-step models for the transition of governance in community associations. Since the late 1970s, numerous states have passed legislation requiring phased transfers of control. Developers have also become increasingly eager to relinquish control earlier because recent court decisions have been holding association boards and managers legally liable for failing to budget adequately, collect assessments, or provide promised improvements.

In many cases developers now relinquish effective authority at 50 percent of sales, rather than waiting until the standard 75 percent benchmark.

The transfer of general control can be achieved earlier without creating great difficulties for developers, as long as they retain permanent control over certain key functions, such as design review of new construction and maintaining sales offices on the property.

In addition to standardizing association management, many developers have also been deemphasizing the provision of extensive recreational services through RCAs. This is true not just for smaller PUDs and condominium developments, but even for very large projects and communities. Developers have either been completely reducing amenity packages or making them voluntary through membership clubs that operate certain costly facilities and recreational services. This trend is an aspect of the broader recent changeover—downsizing community associations to emphasize simply the maintenance of basic common property and the provision of a modest amount of essential services.

Conclusion

The 150-year history of RCAs has been characterized by a long, slow evolution leading to a rapid explosion of association growth in the past 25 years. While much of the attention in the past two decades has been on small associations for condominium and townhouse projects, the longer tradition has been more involved with RCAs for large subdivisions of single-family houses.

Large-scale developers—community builders—have played a key role in establishing the concepts and principles for initiating and managing community associations in order to enhance the long-term quality and value of residential environments. Their early experimentation with this new form of private governance set the standard for the later spread of these innovative institutions in the American intergovernmental system.

Today, when community building is on such a massive scale that residential community associations have become a complicated form of representative governance with huge master associations coordinated with smaller neighborhood associations, large developers still have a key role to play in ensuring the future success of public-private residential policy and management, and in providing leadership and continuing to set high standards for the entire real estate development industry.

References

Ascher, Charles S. "Reflections on the Art of Administering Deed Restrictions." *Journal of Land and Public Utility Economics* 8, 4 (November 1932): 373-377.

_____. "Private Covenants in Urban Redevelopment," in Coleman Woodbury, ed., *Urban Redevelopment: Problems and Practices*. Chicago: University of Chicago Press, 1953.

Barton, Stephen E., and Carol J. Silverman. *Common Interest Homeowners' Associations Management Study*. Sacramento: California Department of Real Estate, 1987.

_____. *Public Life in Private Governments: Neighborhoods with Shared Property*. Working Paper No. 471. Institute of Urban and Regional Development, University of California, Berkeley, 1987.

Beito, David F. *The Private Places of St. Louis: The Formation of Urban Infrastructure through the Market Process, 1869-1920*. Working Paper. Institute for Humane Studies, George Mason University, Fairfax, Virginia. 1988.

Burby, Raymond J. III, and Shirley F. Weiss. *New Communities U.S.A.* Lexington, MA: D.C. Heath Co., Lexington Books, 1976.

Dowden, C. James. *Community Associations: A Guide for Public Officials*. Washington, DC: Urban Land Institute and Community Associations Institute, 1980.

Federal Housing Administration. *Planned-Unit Development with a Homes Association*. Land Planning Bulletin No. 6. Washington, DC: FHA, 1963.

_____. *What Every Builder Should Know about Homes Associations*. Washington, DC: FHA, 1965.

Fishman, Robert. *Bourgeois Utopias*. New York: Basic Books, 1987.

Fitzgerald, Randall. *When Government Goes Private: Successful Alternatives to Public Services*. New York: Universe Books, 1988.

Hubbard, Henry V. "Land Subdivision Restrictions," *Landscape Architecture* 16, 1 (October 1925): 53-54.

Jackson, Kenneth T. *Crabgrass Frontier: The Suburbanization of the United States*. New York: Oxford University Press, 1985.

Keating, Ann Durkin. *Building Chicago: Suburban Developers and the Creation of a Divided Metropolis*. Columbus: Ohio State University Press, 1988.

King, Andrew Jay. *Law and Land Use in Chicago: A Prehistory of Modern Zoning*. New York: Garland Publishing, 1986.

Longhini, Gregory, and David Mosena. *Homeowners' Associations: Problems and Remedies*. PAS Report No. 337. Chicago: American Planning Association, 1978.

Molyneaux, Gary O'Dell. *Planned Land Use Change in an Urban Setting: The J.C. Nichols Company and the Country Club District of Kansas City*. Ph.D. dissertation, University of Illinois, Urbana-Champaign, 1979.

Monchow, Helen C. *The Use of Deed Restrictions in Subdivision Development*. Chicago: Institute for Research in Land Economics and Public Utilities, 1928.

Moore, Colleen Grogan, and Cheryl Siskin. *PUDs in Practice*. Washington, DC: Urban Land Institute, 1985.

Morgan, George T., Jr., and John O. King. *The Woodlands: New Community Development, 1964-1983*. College Station: Texas A&M University Press, 1987.

Mott, Seward H., and Max S. Wehrly. *Subdivision Regulations and Protective Covenants*. Technical Bulletin No. 8. Washington, DC: Urban Land Institute, 1947.

National Association of Home Builders. *Home Builders Manual for Land Development*. Washington, DC: NAHB, 1950.

Nichols, J.C. "A Developer's View of Deed Restrictions," *Journal of Land and Public Utility Economics* 5, 2 (May 1929): 132-142.

_____. *Mistakes We Have Made in Community Development*. Technical Bulletin No. 1. Washington DC: Urban Land Institute, 1945.

Norcross, Carl. *Townhouses & Condominiums: Residents' Likes and Dislikes*. Washington, DC: Urban Land Institute, 1973.

_____. *Open Space Communities in the Market Place*. Technical Bulletin No. 57. Washington, DC: Urban Land Institute, 1966.

Palos Verdes Homes Association. *Protective Restrictions for Palos Verdes Estates*. Los Angeles: the Association, 1923.

Schaffer, Daniel. *Garden Cities for Tomorrow: The Radburn Experience*. Philadelphia: Temple University Press, 1982.

Schuyler, David. *The New Urban Landscape: The Redefinition of City Form in Nineteenth-Century America*. Baltimore: Johns Hopkins University Press, 1986.

Scott, Stanley. "The Homes Association: Will Private Government Serve the Public Interest?" *Public Affairs Report* 8, 1 (February 1967): 1-4.

Sies, Mary Corbin. *American Country House Architecture in Context: The Suburban Ideal of Living in the East and Midwest, 1877-1917*. Ph.D. dissertation, University of Michigan, 1987.

Staeh, Patricia Burgess. "Deed Restrictions and Subdivision Development in Columbus, Ohio, 1900-1970." *Journal of Urban History* 15, 1 (November 1988): 42-68.

Stilgoe, John R. *Borderland: Origins of the American Suburb, 1820-1939*. New Haven: Yale University Press, 1988.

Urban Land Institute. *The Community Builders Handbook*. Washington, DC: ULI, 1947.

_____. *The Homes Association Handbook*. Technical Bulletin No. 50. Washington, DC: ULI, 1964.

_____. *Residential Development Handbook*. Washington, DC:ULI, 1978.

Urban Land Institute and Community Associations Institute. *Managing a Successful Community Association*. Washington, DC: ULI, 1974.

_____. *Creating a Community Association: The Developer's Role in Condominium and Homeowner Associations*. Washington, DC: Urban Land Institute, 1977.

Van Weesep, Jan. "The Creation of a New Housing Sector: Condominiums in the United States." *Housing Studies* 2, 2 (April 1987): 122-133.

Volpert, Richard S. "Creation and Maintenance of Open Spaces in Subdivisions: Another Approach." *UCLA Law Review* 12 (1965): 830-855.

Warner, Sam Bass, Jr. *Streetcar Suburbs: The Process of Growth in Boston,1870-1900*. Cambridge: Harvard University Press, 1962.

Wehrly, Max S. "Homes Associations, Their Establishment and Functions." *Urban Land* 5, 6 (June 1946): 1-3.

Weiss, Marc A. *The Rise of the Community Builders: The American Real Estate Industry and Urban Land Planning*. New York: Columbia University Press, 1987.

Wolfe, David B. *Condominium and Homeowner Associations that Work*. Washington, DC: Urban Land Institute and Community Associations Institute, 1978.

Worley, William S. *Planned for Permanence: J.C. Nichols and the Origins of Planned Residential Communities*. Columbia: University of Missouri Press, 1989.

Residential Community Associations: Further Differentiating the Organization of Local Public Economies

Ronald J. Oakerson
Workshop in Political Theory and Policy Analysis
Indiana University

Introduction

Residential community associations (RCAs) play a still small but increasingly important role in the organization of local public economies.[1] Local governments have never been the exclusive providers of local public goods and services, nor have they been the only regulators of private housing in the interest of neighborhood amenities. Present-day RCAs may resemble the original institutions of American local governance (such as New England towns) more closely than do the cities that serve as basic local governments for a majority of Americans today.

In suburban America, however, local government arrangements have become highly differentiated among a variety of single-purpose and multipurpose institutions.[2] Differentiation allows organizational arrangements to be matched more closely to the specific tasks they perform. After decades of reform argument in behalf of greater integration in the provision of local services, the rapid growth in the number of RCAs represents a sharp increase in the differentiation of both local service provision and regulation to secure neighborhood amenities.

Local public economies in the United States tend to be complex and to a large degree self-organizing. One way to map the complex structure of local public economies is to distinguish the provision of local public goods and services from their production.[3] Provision, in general, refers to collective choices that determine:

- The goods and services to be provided and those that are to remain private.
- The private activities to be regulated and the type and degree of regulation.
- The amount of revenue to raise and how to raise it, whether by various forms of taxation or by user pricing.
- The quantity and quality standards of goods and services to be provided.

- The arrangements for obtaining production of goods and services.

Production, as distinguished from provision, refers to the more technical process of transforming resource inputs into outputs—making a product, constructing a facility, or rendering a service. Local public economies thus consist of a provision side and a production side, each organized somewhat differently, but linked by a variety of interlocal arrangements.

The basic choice on the provision side is whether to make any sort of collective or nonmarket provision at all. Otherwise, provision remains in the hands of households and firms interacting in a market. If collective provision is to be made, the next decision concerns how to provide services. The two major alternatives are (1) taxing and spending to provide goods and services or (2) regulating private activity in order to shape private decisions to a collective purpose. Provision activities thus include, on the one hand, setting tax rates and user charges and choosing how to spend the funds collected and, on the other hand, enacting and enforcing rules and regulations that constrain private behavior according to stipulated criteria. Finally, if goods and services are to be provided, there follows a basic choice of how to arrange for production—whether by organizing a production unit "in-house" or by selecting and hiring outside producers (public or private). Having arranged for production, provision requires monitoring the quality and quantity of goods and services produced, representing the interests of citizen-consumers to producers, and holding producers accountable for their performance.

RCAs are, in this conceptual framework, provision units acting within a local public economy. In market economy terms, an RCA is more closely analogous to a household than to a firm. One step removed from households, an RCA is an organization of households for the purpose of providing collective goods and services within a common neighborhood environment. As collective provision units, RCAs are functionally a part of the local public economy, even though they are organized under the terms of private law. An analysis of RCAs should consider how they relate to other parts of local public economies (including local governments), and an evaluation should take into account the net contribution of RCAs to the performance of local public economies.

RCAs as Provision Units

The root difference between RCAs and municipalities is in the way they are created. An RCA is established by a developer through private deed covenants that create some form of common property and assign rights and duties to homeowners. In contrast, a municipality is usually created by local citizens who act collectively under terms and procedures specified by state law. Much like a municipal government, however, an RCA, once created, cares for common property, provides services, and regulates private behavior. In other words, both RCAs and municipalities provide public or collective goods, either in the form of community services or in the form of regulations that create neighborhood amenities. Both have instruments of coercion at their disposal.

The two basic functions of RCAs—community service provision and care of common property and the regulation of private property—are actually handled, however, in very different ways. In the first case, an RCA functions in much the same way as a municipality: mandatory dues are collected and elected officers make discretionary spending decisions. In the second case, regulations are usually determined by deed covenant and are simply enforced by the association. The private method of RCA formation has implications for both functions, but especially for the second. Each function is discussed separately below.

Service Provision

The theory of local public economies suggests three criteria for evaluating a provision unit: preference aggregation and expression, fiscal equivalence, and accountability.[6] In terms of aggregating preferences to provide services, an RCA allows a community to act collectively, without requiring the willing consent of each and every homeowner, operating in much the same manner as a local government. The enforcement mechanism tends to be different and more indirect, relying mainly on property liens to collect delinquent dues. One of the major differences between RCAs and local governments is that RCAs tend to be much smaller, with boundaries that are closely matched to a particular subdivision or housing development. Where the benefits of service provision are confined to the community of householders organized by an RCA, the use of RCAs appears to offer potential advantages over larger municipalities. RCAs allow for more diverse preference expression and more precise fiscal equivalence. There are also potential advantages in accountability. Frequent elections and relatively easy, informal access to association officers would tend to increase the potential accountability of an RCA "government" to its members.

RCAs also tend to use financing arrangements that are less likely to distort economic relationships than traditional local government taxes. RCA fees tend to be more explicitly benefit based, whether using square feet of dwelling space, acre feet of lot

area, length of frontage, or a flat rate as a basis for assessment. The rate of assessment is determined by the cost of services, not by other factors, such as the market value of property. This would add to a greater sense of fiscal equivalence in RCAs. In other words, RCA members tend to "get what they pay for and to pay for what they get."

As service providers, RCAs tend overwhelmingly to be "pure provision" units.[5] That is, they make provision for collective goods and services by collecting dues and deciding on types and levels of expenditure, but they do not actually produce the services that they provide. Instead, RCAs operate in the local public economy as collective consumers who employ outside parties—either private firms or local government agencies—to produce and deliver services to them. Such pure provision units have possible advantages insofar as elected officers are free to focus on the representation of consumer interests rather than having to balance the interests of consumers against producers, as must happen when a local government directly employs a large public bureaucracy.[6] Consumer interests may tend to be represented more accurately by pure provision units. This, too, would enhance the accountability of association officers to members.

Regulation

Unlike service provision, RCAs do not regulate private property in a way that is similar to local government regulation. The private property base of RCAs has different implications for how the regulatory function is performed. In an RCA, deed covenants assign property rights to neighbors that consist of specific duties that homeowners must observe. Restrictions on the use of private property in an RCA also have the status of private property. Each homeowner in such an association has a property right in the maintenance of restrictions required by deed covenant. In many cases, modifications in these restrictions require the consent of every homeowner. The institution of private property is thus stood on its head: property rights, which tend to protect individuals from interference in the use of their property outside RCAs, facilitate such interference inside RCAs.

The property rights basis for municipal zoning is quite different. Outside an RCA, homeowners are presumed to be at liberty to do as they please with their property, as long as public health and safety are not impaired. Municipalities, using the police power, may enact zoning ordinances that restrict the use of property without actually taking property for public use. Zoning ordinances can be modified by a majority vote of the members of the designated public bodies. Municipal zoning is potentially a much more flexible instrument of regulation than private deed covenants enforced by an RCA. At the same time, private covenants are a much more certain instrument of regulation than a municipal zoning ordinance.

RCAs trade flexibility to obtain greater certainty in the maintenance of neighborhood amenities. A potential difficulty with a trade-off that denies nearly all flexibility is the possibility that one person's amenity can become another person's tyranny. In addition, as preferences change over time, there may be a demand for adjustments that most association members, but perhaps not all, would agree to. The principal mechanism for adjusting property restrictions to individual preferences in most RCAs may be exit—dissatisfied homeowners move out. Municipal organization, in contrast, allows for adjustment on the basis of citizen voice, on an assumption that a majority of voices should prevail, in addition to exit.[7] Homeowners need resort to exit only if local political processes are unavailing.

RCA Formation and Governance

For the relatively clear advantages associated with RCA service provision and for the somewhat more ambiguous advantage of greater certainty in maintaining homeowner restrictions, the members of RCAs pay a price—relatively high transaction costs (i.e., costs of time and effort in making decisions and relating to one another), particularly in the early history of an association. Even though RCAs are actually created by developers, associations appear to go through a period of self-organization as members come to terms with their situation.[8] The members are, in a sense, forced into a collective arrangement—even though they enter voluntarily by buying a dwelling, the arrangement comes with the dwelling—an arrangement in which they cannot take for granted the maintenance of common facilities and common rules. When it comes to changing regulations that are written into deed covenants, the transaction costs threaten to become prohibitive. A much greater status quo bias typically is built into the organization of an RCA than is built into a municipal organization.

A developer, by writing deed covenants, is in effect choosing a set of rules intended to govern the relationships among neighbors in a community in perpetuity. This raises a series of questions. Does the developer take into account the transaction costs for future homeowners to secure changes? Or are these costs—which are quite high—effectively counted as zero? Would homeowners, if they were writing their own RCA "constitution," choose a different body of rules that would allow a somewhat greater capability to change neighborhood amenity regulations? Would the trade-off between flexibility and certainty be resolved as much in favor of certainty? Of course, home buyers might be presumed to take these costs into account as they decide whether to purchase a home located in a particular RCA. Yet, home buyers

may act on imperfect information or make mistakes, and preferences may change.

RCAs therefore have potential difficulties as interest-aggregation mechanisms, not so much in the provision of goods and services, but in the regulation of homeowner behaviors that affect neighborhood amenities. The developer, in making a set of constitutional decisions for future homeowners, does not necessarily take into account the potential costs of seeking changes in the body of regulations. Only by including homeowner duties in the structure of property rights is it possible for the developer to sell, not only individual parcels, but a certain neighborhood environment as well. Presumably, this adds to the market value of each unit by internalizing the external benefits that each unit conveys to others.

Alternative mechanisms for constituting RCAs could preserve the initial capability of a developer to include amenity regulations as part of a housing development, while guaranteeing greater flexibility to the future community of homeowners. The developer might be allowed to designate an initial set of amenity regulations to be incorporated in the deed, but also be required to enable an association to relax the regulations by some extraordinary-majority vote after a designated period of time.[9] This would create, in place of an unqualified private property regime, a limited public capability on the part of the association to modify private property rights, analogous to municipal zoning powers but with the reverse effect. Most state legislatures would probably be capable, under federal and state constitutions, of constraining the establishment of RCAs in this manner. Existing RCAs might also be authorized to adopt this new form of association by an extraordinary-majority vote, although such a procedure could lead to legal challenges based on the proposition that any rule other than unanimity would amount to a taking of private property, thus requiring just compensation.

The difficulties associated with homeowner restrictions are also related to a more fundamental question: whether RCAs are capable of self-governance at all.[10] This question needs to be sorted into two parts.

First, there is the amount of time and effort that individual homeowners must spend in order to make an RCA work. The level may be higher than individuals would choose of their own volition, but the constitutional choice is made by a developer. Still, we know from the St. Louis experience with private street associations that RCAs, when given an opportunity to shed the load of decisionmaking, may often decline to do so.[11] The highest costs seem to occur early in the history of an RCA, but this is likely to be true of any organization.

Second, there is the problem of conflict. This divides into two types: (1) ordinary conflict among neighbors in the absence of a clear definition of rights and liberties and (2) conflict between individuals and the association over the enforcement of restrictions on homeowner behavior. By clearly defining the duties of homeowners, RCAs may reduce ordinary conflict among neighbors, but this is done by creating the potential for conflict between the association and isolated individuals who feel aggrieved. RCAs may encourage open conflict and dispute insofar as they bring the discussion of reciprocal externalities among homeowners into an open and public realm. Such conflict may often be productive, but only when there are appropriate grounds for settlement and the means of attaining resolution.

In order to make an RCA work, individual homeowners, arguably, must learn the art of mutual accommodation—learn to live together peaceably. Some degree of social learning is surely necessary for any group to practice self-governance. It may be that many Americans have lost much of the cultural disposition that Alexis de Tocqueville summed up as "self-interest rightly understood," an orientation that, according to Tocqueville's account, led township residents in early nineteenth-century New England to cultivate the goodwill of their neighbors.[12]

It may also be the case, however, that the mutual enforcement of rigid regulations of behavior is not a particularly salutary basis on which neighbors can cultivate one another's goodwill. It is one thing to be able to enforce general norms of behavior that most people accept as reasonable principles of good conduct; it is another to enforce detailed codes of conduct that may seem arbitrary, and based more on an abstract desire for uniformity than a real need for people who live together to accommodate one another. Rigid regulations may foreclose opportunities for a mutually productive settlement of differences among neighbors. In the absence of a means of resolution, conflict can escalate. Exit may become the only productive option available.

Relationships between RCAs and Other Provision Units

All RCAs are located within the boundaries of some sort of local government—in most cases, more than a single local government. Each of these local governments is also a provision unit in the local public economy.

During the formation period, RCAs are affected by local government regulations concerning subdivision development. The facilities initially provided by a developer may be in response partly to local government regulations as well as to consumer demand. Some local government standards may be

avoided by treating facilities as the "private" property of an RCA rather than as "public" property to be maintained by a local government. Thus, the regulatory activities of an overlying unit affect the provision activities and responsibilities of RCAs. Some of these consequences may be unintended, although not necessarily problematic (i.e., the intention is to require developers to build facilities to a certain standard, but the result is to endow RCAs with greater provision responsibilities).

Once established, both the RCA and local governments function concurrently as provision units for the same population. To a considerable degree, RCAs seem to *substitute* for service provision by local governments and, often, simultaneously increase the level of service provision for association members. Consequently, RCAs tend to reduce the service demands made on municipalities and counties, while responding more precisely to the service demands of their members. Less frequently, RCAs function as supplementary service providers, adding their own increments to the level of provision made available by local governments.

To the extent that RCA service provision substitutes for local government provision, a degree of tension arises between RCAs and overlying local governments with respect to taxes. A local government may continue to collect taxes from the residents of RCAs, while not providing them with services comparable to those provided to non-RCA residents. This tension is not different from the difficulties that often accompany overlying jurisdictions among general-purpose local governments (e.g., counties that overlay both municipalities and unincorporated areas). Counties sometimes offer tax concessions to municipalities to encourage them to undertake their own service provision, thus relieving county government of responsibility. RCAs offer the potential for similar "load shedding" by local governments. In any event, overlapping service responsibilities among jurisdictions in no way imply wasteful duplication of effort.[13]

In the case of St. Louis private street associations,[14] two municipalities are virtually blanketed by private streets, and there is no problem of disparity in municipal street provision within those municipalities. In the other municipalities, however, RCA residents pay taxes to support municipal streets while also paying for their subdivision streets separately. This represents a significant departure from fiscal equivalence in the municipality. RCA residents are subsidizing street services for non-RCA residents. Yet, private street associations get the added benefit of being able to control street access, and this may be mainly what they are paying for. The price of autonomy is what is sometimes called "double taxation."

One option available to many, but not all, RCAs is to create a new local government with coterminous boundaries. If the immediate overlying local government is a county or a township, it is possible that the citizens of an RCA may be able to incorporate as a municipality, depending on state law. When this happens, the RCA continues to exist, but is supplemented by municipal organization. Pennsbury Village, located in Allegheny County, just outside Pittsburgh, is a condominium that incorporated as a borough under Pennsylvania law when faced with a demand by the overlying township to abandon its sewage treatment facility and hook onto a new township system.[15] Many of the small municipalities in St. Louis County were originally private subdivisions, and the subdivision associations continue to function concurrently with the municipalities.[16]

Another role that may be assumed by overlying local governments relates to conflict resolution. Conflicts between individual homeowners and an RCA would seem to require reference to third parties. Often this can mean litigation, but an overlying local government can, by mediating conflicts, provide a service short of going to court. Information disclosure rules, required by state law or local ordinance, amount to anticipatory conflict resolution. The use of overlying jurisdictions to provide an arena for the resolution of conflicts in complex local public economies is hardly unusual. The only difference in this case is the private legal character of RCAs. Because the RCA results from a series of private transactions, conflicts that arise seem to come to the attention of state and local consumer protection agencies. A conflict between an RCA and an individual member, however, is not one between a seller and a buyer. Not only is the relevant law that applies much different, but the relationship among neighbors also is a continuing one. A closer analogy would exist to family relations than to consumer protection.

Conclusion

A substantial consensus is emerging that the care of common property and neighborhood service provision are appropriate RCA functions. Regulation of private property use is perhaps also an appropriate function of RCAs, assuming an increasing demand for neighborhood amenities and an assurance that current amenities will continue. In buying into an RCA, homeowners implicitly agree to shoulder the burdens associated with participation in governing a collective association in order to manage common grounds and facilities. Deed covenants amount to a tacit "social contract" among the members of an RCA. Adjustments of property relations among homeowners, however, may often be too difficult. Market adjustments cannot correct for a developer's mistake in writing deed covenants that homeowners subsequently learn are too restrictive. The rules under which RCAs are formed and, in particular, the rules under which restrictive covenants are written and can be rewritten, need to be

evaluated carefully in view of accumulating experience.

Overall, RCAs have much to contribute to the performance of local public economies. By closely matching association boundaries to particular subdivisions and housing developments, and by using revenue-raising instruments that are closely matched to benefits received, RCAs yield both fiscal equivalence and more precise preference satisfaction for their members. RCA members tend to get what they pay for and to pay for what they get—from their association. Difficulties arise, however, in fiscal equivalence among RCA and non-RCA communities within local government jurisdictions. As RCAs increase in number, the payment of taxes by RCA members without an equivalent return in public services can be expected to generate conflict. At the same time, some local governments may find RCAs a useful means of "load shedding," allowing them to concentrate on service provision and regulation activities that address issues of broader concern than specific neighborhoods. The result will be a more highly differentiated local public economy that is better able to serve both the diverse and the common interests of its various communities.

NOTES

[1] See ACIR, *The Organization of Local Public Economies*, A-109 (Washington, DC: U.S. ACIR, December 1987) and Ronald J. Oakerson, "Local Public Economies: Provision, Production, and Governance," *Intergovernmental Perspective* 13 (Summer/Fall 1987): 20-25.

[2] See, for example, ACIR, *Metropolitan Organization: The St. Louis Case*, M-158 (Washington, DC: U.S. ACIR, September 1988).

[3] This distinction was introduced by Vincent Ostrom, Charles M. Tiebout, and Robert Warren, "The Organization of Government in Metropolitan Areas: A Theoretical Inquiry," *American Political Science Review* 55 (December 1961): 831-842. See ACIR, *The Organization of Local Public Economies* for an elaboration of these ideas.

[4] See ACIR, *The Organization of Local Public Economies*, pp. 7-10.

[5] Ibid., pp. 18-20.

[6] See the argument made by Anthony Downs, *Urban Problems and Prospects*, 2nd ed. (Chicago: Rand McNally College Publishing Company, 1976), Chapter 12.

[7] The distinction between exit and voice was introduced by Albert O. Hirschman, *Exit, Voice and Loyalty* (Cambridge, Mass.: Harvard University Press, 1970).

[8] See the discussion by Dean Miller in this volume.

[9] Many developers voluntarily allow this practice, but it is not known to what extent this practice is followed.

[10] See the critique by Stephen Barton and Carol Silverman in this volume.

[11] See the discussion by Ronald Oakerson in this volume.

[12] Alexis de Tocqueville, *Democracy in America* (New York: Alfred A. Knopf, 1945 [1835]).

[13] See, for example, ACIR, *Metropolitan Organization: The St. Louis Case*, pp. 151-152.

[14] See the discussion by Ronald Oakerson in this volume.

[15] See ACIR, *Metropolitan Organization: The Allegheny County Case* (forthcoming 1989).

[16] ACIR, *Metropolitan Organization: The St. Louis Case*, pp. 15-17.

Appendices

1. The Conference

Residential Community Associations: An Intergovernmental Perspective

June 13-14, 1988

June 13

Focus: **RCAs as "Private Governments"**

9:00 a.m. *Welcome*

John Kincaid
U.S. ACIR

9:15 a.m. *Philosophical and Empirical Background*

Robert Nelson
U.S. Department of the Interior
James Winokur
College of Law, University of Denver

Discussant:

Dolores T. Martin
The White House

10:45 a.m. *RCA Governance and Service Provision*

Stephen Barton and ***Carol Silverman***
University of California, Berkeley
Ronald J. Oakerson
U.S. ACIR

Discussants:

William Blomquist
Indiana/Purdue University
Jacqueline Dewey
Columbia Association

1:30 p.m. *The Implications of "State Action" for Local Governments*

Katharine Rosenberry
California Western School of Law

Discussants:

John Maberry
Fairfax County Consumer Affairs
A. Dan Tarlock
Chicago-Kent College of Law

3:00 p.m. *Issues in Land Use*

A. Dan Tarlock
Chicago-Kent College of Law

Discussant:

Doug Kleine
Community Associations Institute

4:00 p.m. *Roundtable:*
Are RCAs a good idea? Do they contribute to service provision and self governance in local communities?

Moderator:

William Blomquist
Indiana/Purdue University

Participants:

Robert Nelson
U.S. Department of the Interior

Stephen Barton and ***Carol Silverman***
University of California, Berkeley
A. Dan Tarlock
Chicago-Kent College of Law
Dean Miller
U.S. Department of Housing and Urban Development
Pamela Mack
Columbia Association

June 14

Focus: **RCAs in the Intergovernmental System**

9:00 a.m. *The Role of Large-Scale Developers in Private Residential Governance*

Marc A. Weiss and ***John Watts***
Lincoln Institute of Land Policy, Cambridge

Discussants:

Tom Burgess
Reston Association
Dennis Tomsey
Trammel Crow Company

10:30 a.m. *The Use of Challenge Grants to Encourage RCA Formation*

Mark Frazier
The Services Group
Arlington, Virginia

Discussant:

Winfield Sealander
Sealander Brokerage, Ltd.

1:30 p.m. *The Life Cycle of RCAs*

Dean Miller
U.S. Department of Housing
and Urban Development

Discussants:

Barbara Gregg
Montgomery County, Maryland
Consumer Affairs
Marc Burford
Maryland Department of Housing
and Community Development

2:30 p.m. *The Range of Issues Facing Local Governments*

C. James Dowden
Community Associations Institute

3:15 p.m. *Roundtable: How do/should RCAs fit into the intergovernmental system?*

Moderator:

Ronald J. Oakerson
ACIR

Participants:

C. James Dowden
Community Associations Institute
Barbara Gregg
Montgomery County, Maryland
Consumer Affairs
John Maberry
Fairfax County Consumer Affairs
Don Pepe
National Association of Counties
Tom Burgess
Reston Association
Marc Burford
Maryland Department of Housing
and Community Development

2. *Attendees*

Stephen Barton
Institute for Urban and Regional Development
University of California at Berkeley

Widiam Blomquist
Department of Political Science
Indiana University
Purdue University
Indianapolis

Marc Burford
Maryland Department of Housing
and Community Development

Tom Burgess
Reston Association

Debra Dean
Advisory Commission
on Intergovernmental Relations

Jacqueline Dewey
Columbia Association

C. James Dowden
Community Associations Institute

Mark Frazier
The Services Group

Barbara Gregg
Montgomery County, Maryland,
Office of Consumer Affairs

John Kincaid
Advisory Commission
on Intergovernmental Relations

Doug Kleine
Community Associations Institute

John Maberry
Fairfax County, Virginia,
Department of Consumer Affairs

Pamela Mack
Columbia Association

Andrew Mansinne
Montgomery County, Maryland,
Office of Legislative Oversight

Dolores Martin
White House Interagency
Low Income Opportunity Advisory Board

Bruce D. McDowell
Advisory Commission
on Intergovernmental Relations

Dean Miller
Department of Housing and Urban Development
Region 9, San Francisco

Robert Nelson
U.S. Department of the Interior

Ronald J. Oakerson
Advisory Commission
on Intergovernmental Relations

Don Pepe
National Association of Counties

Katharine Rosenberry
California Western School of Law

Winfield S. Sealander
Sealander Brokerage Ltd.

Carol Silverman
Institute for Urban and Regional Development
University of California at Berkeley

Dan Tarlock
Chicago-Kent College of Law

Dennis Tomsey
Trammel Crow Company

John Watts
Lincoln Institute of Land Policy

Marc Weiss
Lincoln Institute of Land Policy

James Winokur
College of Law
University of Denver

3. The Survey

COMMUNITY ASSOCIATION QUESTIONNAIRE

1. In what **state** is your community located? _____

2. Would you say that your association is in an *(Please circle the number of the answer that best applies.)*

   1. Urban area 2. Suburban area 3. Rural area

3. Is payment of dues to your association required by the deed to the residences, or do individuals join and pay voluntarily? *(Please circle the number of the answer that best applies.)*

   1. Payment required by the deed.
   2. Join and pay voluntarily
   3. Other *(please specify)*

   _____

4. Approximately what percentage of your community is composed of *(Please supply approximate percentages for each type.)*

   Single family detached and semi-detached houses _____%
   Single family townhouses/duplexes _____%
   3-5 story multiunit, multifamily structures _____%
   High-rise structures (more than five stories) _____%

5. What is the total number of units, lots, or homes that hold membership in your association?

   Enter number here:_____

6. In what year (approximately) was your association established? *(Please circle the number of the answer that best applies.)*

   1. Before 1940 3. 1961-1970 5. 1976-1980 7. 1985-1988
   2. 1941-1960 4. 1971-1975 6. 1981-1985 8. Not sure

7. Is your community association a *(Please circle the number of the answer that best applies.)*

   1. Homeowner/property owner/PUD association
   2. Condominium association
   3. Cooperative association
   4. Other *(please explain below)*

   _____

8. What are your average association dues per unit this year? *(Please do **not** include special assessments.)*

   $_____

9. To the best of your knowledge, does your association **regulate** any of the items listed below by convenant? If yes, does your association **actively enforce** the regulation? *(Please circle the correct reponse from Column A. If you circle yes in* ***Column A****, please also circle yes or no in* ***Column B****.)*

Items	***Column A*** **Is Item Regulated By Covenant?**			***Column B*** **If Regulated, Is It Actively Enforced?**	
	Yes	No	Not Sure	Yes	No
1. Exterior color or decoration of individual units	Y	N	NS	Y	N
2. Exterior remodeling of units	Y	N	NS	Y	N
3. Shrubbery/trees/lawn decorations on unit lots	Y	N	NS	Y	N
4. Fences on unit lots	Y	N	NS	Y	N
5. Exterior TV or radio antennas on unit siding, windows or roofs	Y	N	NS	Y	N
6. Type/number of pets owned by homeowners (e.g. dogs, cats, snakes, etc.)	Y	N	NS	Y	N
7. Parking of trucks vans, RVs, or boats	Y	N	NS	Y	N
8. Noise within or outside of units	Y	N	NS	Y	N
9. Religious worship within homes or on unit lots	Y	N	NS	Y	N
10. Residence by children in the community	Y	N	NS	Y	N
11. Residence by adults **below** a certain age in the community	Y	N	NS	Y	N
12. Number of persons living in one unit	Y	N	NS	Y	N
13. Number of guests permitted in a unit at any one time	Y	N	NS	Y	N
14. Leasing or subleasing of units	Y	N	NS	Y	N
15. Other *(Please describe)*					

10. Which of the following services does your association provide, or directly pay contractors to provide, from dues and/or special assessments?

Streets *(Please circle the number for* ***each item*** *that applies.)*

1. Street repair
2. Street lighting
3. Sidewalks
4. Parking lot repair
5. Snow removal

Recreation *(Please circle the number for* ***each item*** *that applies.)*

6. Swimming pool
7. Lake or beach
8. Tennis courts
9. Indoor community center
10. Play areas/tot lots
11. Other recreation facilities

Security *(Please circle the number for* ***each item*** *that applies.)*

12. Security patrol
13. Gates or fences

Maintenance *(Please circle the number for each item that applies.)*

14. Grass cutting in common areas
15. Trees/shrubbery in common areas
16. Trash collection
17. Painting/outside maintenance
18. Water or sewer

10A. Does your association provide or pay for any other services not mentioned above? If so, please list them below:

_____

11. Does your association restrict access by outsiders to the community in any of the following ways? *(Please circle the number for each item that applies.)*

1. Posted signs
2. Speed bumps
3. Fences
4. Parking permits
5. Closed streets
6. Gates
7. Guards

RELATIONS WITH LOCAL GOVERNMENTS

For Questions 12 to 16, "local government" may refer to a county, city, municipality, village, township or special district, whichever applies in your case.

12. Below is a list of issues that may have affected your association in recent years. **Column A** asks if your association has attempted to influence local government. **Column B** asks if local government has attempted to influence your association. *(For each issue, please circle the correct responses from Column A and Column B.)*

	Column A **Has Your Association Attempted To Influence Local Government On This Issue?**			*Column B* **Have Local Government Officials Attempted To Influence Your Association On This Issue?**		
Issues	Yes	No	Not Sure	Yes	No	Not Sure
Traffic patterns through your community	Y	N	NS	Y	N	NS
Traffic patterns around your community	Y	N	NS	Y	N	NS
Locating stop signs/lights	Y	N	NS	Y	N	NS
Development/growth	Y	N	NS	Y	N	NS
Local government taxes	Y	N	NS	Y	N	NS
Animal control	Y	N	NS	Y	N	NS
Police protection	Y	N	NS	Y	N	NS
Water/sewer	Y	N	NS	Y	N	NS
Zoning	Y	N	NS	Y	N	NS
Parks and recreation	Y	N	NS	Y	N	NS
Parking in or around your community	Y	N	NS	Y	N	NS
Environmental pollution	Y	N	NS	Y	N	NS
Schools	Y	N	NS	Y	N	NS

13. How fairly or unfairly would you say local government, in general, treats your association with respect to the following issues? *(Please circle the number under the best response for each answer.)*

Issues	Very Fairly	Somewhat Fairly	Somewhat Unfairly	Very Unfairly	Don't Know
Traffic patterns through your community	1	2	3	4	5
Traffic patterns around your community	1	2	3	4	5
Locating stop signs/lights	1	2	3	4	5
Development/growth	1	2	3	4	5
Local government taxes	1	2	3	4	5
Animal control	1	2	3	4	5
Police protection	1	2	3	4	5
Water/sewer	1	2	3	4	5
Zoning	1	2	3	4	5
Parks and recreation	1	2	3	4	5
Parking in or around your community	1	2	3	4	5
Environmental Pollution	1	2	3	4	5
Schools					

14. Does your association or its members receive any **tax reimbursement** or other tax consideration from local government for services provided by the association? *(Please circle the number under the best response for each service.)*

Services	Yes, Tax Reimbursement Or Consideration Received	No, Tax Reimbursement Or Consideration Not Received	Don't Know
Street repair	1	2	3
Street lighting	1	2	3
Sewer	1	2	3
Water	1	2	3
Trash collection	1	2	3
Other			

If other, please specify any other services:

---

15. If your association receives any of the following services from a local government, please indicate **how**. Does your association **contract** with a local government to receive the service? Does local government provide the service as one of its regular, **tax-supported** services? Does each household **pay** local government **directly** for the service? Or is local government **not involved** at all? *(Please circle the number under the best response for each service.)*

Services	Association Pays Under Contract With Local Government	Local Government Provides As Tax-Supported Service	Household Pays Local Government Directly	Local Government Not Involved	N/A (Service Not Provided At All)
Animal Control	1	2	3	4	5
Police Patrol	1	2	3	4	5
Trash Pickup	1	2	3	4	5
Water/Sewer	1	2	3	4	5
Street Repair	1	2	3	4	5
Snow Removal					

16. Overall, how would you rate the level of cooperation between your community and local government?

1. Excellent
2. Good
3. Fair
4. Poor
5. No contact
6. Don't know

17. Does your association currently have any problems with local government? If so, what are those problems? *(Please explain briefly.)*

_____

_____

_____

_____

_____

_____

_____

18. Do you have any other comments?

_____

_____

_____

_____

_____

_____

_____

Recent Publications of the Advisory Commission on Intergovernmental Relations

Readings in Federalism—Perspectives on a Decade of Change, SR-11, 5/89, 128 pp.	$10.00
Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal, A-111, 4/89, 136 pp.	$10.00
1986 State Fiscal Capacity and Effort, M-165, 3/89, 128 pp.	$15.00
Hearings on Constitutional Reform of Federalism: Statements by State and Local Government Association Representatives, M-164, 1/89, 60 pp.	$5.00
Significant Features of Fiscal Federalism, 1989 Edition, Vol. I, M-163, 1/89, 160 pp.	$15.00
State and Federal Regulation of Banking: A Roundtable Discussion, M-162, 11/88, 36 pp.	$5.00
Assisting the Homeless: State and Local Responses in an Era of Limited Resources, M-161, 11/88, 160 pp.	$10.00
Devolution of Federal Aid Highway Programs: Cases in State-Local Relations and Issues in State Law, M-160, 10/88, 60 pp.	$5.00
State Regulations of Banks in an Era of Deregulation, A-110, 9/88, 36 pp.	$10.00
State Constitutional Law: Cases and Materials, M-159, 9/88, 480 pp.	$25.00
Changing Public Attitudes on Governments and Taxes: 1988, S-17, 9/88, 88 pp.	$10.00
Local Revenue Diversification: Local Income Taxes, SR-10, 8/88, 52 pp.	$5.00
Metropolitan Organization: The St. Louis Case, M-158, 9/88, 176 pp.	$10.00
Significant Features of Fiscal Federalism, 1988 Edition	
Vol I, M-155, 12/87, 128 pp.	$10.00
Vol II, M-155 II, 9/88, 152 pp.	$10.00
Both Volumes Purchased Together	$15.00
Interjurisdictional Competition in the Federal System: A Roundtable Discussion, M-157, 8/88, 32 pp.	$5.00
State-Local Highway Consultation and Cooperation: The Perspective of State Legislators, SR-9, 5/88, 54 pp.	$5.00
The 1986 Federal Tax Reform Act: Its Effect on Both Federal and State Personal Income Tax Liabilities, SR-8, 1/88, 38 pp.	$5.00
Governments at Risk: Liability Insurance and Tort Reform, SR-7, 12/87, 42 pp.	$5.00
The Organization of Local Public Economies, A-109, 12/87, 64 pp.	$5.00
Measuring State Fiscal Capacity, 1987 Edition, M-156, 12/87, 152 pp.	$10.00
Is Constitutional Reform Necessary to Reinvigorate Federalism? A Roundtable Discussion, M-154, 11/87, 39 pp.	$5.00
Local Revenue Diversification: User Charges, SR-6, 10/87, 64 pp.	$5.00
The Transformation in American Politics: Implications for Federalism, B-9R, 10/87, 88 pp.	$5.00
Devolving Selected Federal-Aid Highway Programs and Revenue Bases: A Critical Appraisal, A-108, 9/87, 56 pp.	$10.00
Estimates of Revenue Potential from State Taxation of Out-of-State Mail Order Sales, SR-5, 9/87, 10 pp.	$3.00
A Catalog of Federal Grant-in-Aid Programs to State and Local Governments: Grants Funded FY 1987, M-153, 8/87, 36 pp.	$10.00
Fiscal Discipline in the Federal System: National Reform and the Experience of the States, A-107, 8/87, 58 pp.	$10.00
Federalism and the Constitution: A Symposium on *Garcia*, M-152, 7/87, 88 pp.	$10.00

The reports of the Advisory Commission on Intergovernmental Relations are released in five series: the "A" series denotes reports containing Commission recommendations; the "M" series contains Commission information reports; the "S" series identifies reports based on public opinion surveys; the "B" series reports are abbreviated summaries of full reports; and the "SR" series are staff information reports. Reports may be obtained from ACIR, 1111-20th Street, NW, Washington, DC 20575.

What is ACIR?

The Advisory Commission on Intergovernmental Relations (ACIR) was created by the Congress in 1959 to monitor the operation of the American federal system and to recommend improvements. ACIR is a permanent national bipartisan body representing the executive and legislative branches of Federal, state, and local government and the public.

The Commission is composed of 26 members—nine representing the federal government, 14 representing state and local government, and three representing the public. The President appoints 20—three private citizens and three federal executive officials directly, and four governors, three state legislators, four mayors, and three elected county officials from slates nominated by the National Governors' Association, the National Conference of State Legislatures, the National League of Cities, U.S. Conference of Mayors, and the National Association of Counties. The three Senators are chosen by the President of the Senate and the three Representatives by the Speaker of the House of Representatives.

Each Commission member serves a two-year term and may be reappointed.

As a continuing body, the Commission addresses specific issues and problems, the resolution of which would produce improved cooperation among the levels of government and more effective functioning of the federal system. In addition to dealing with important functional and policy relationships among the various governments, the Commission extensively studies critical governmental finance issues. One of the long-range efforts of the Commission has been to seek ways to improve federal, state, and local governmental practices and policies to achieve equitable allocation of resources and increased efficiency and equity.

In selecting items for the research program, the Commission considers the relative importance and urgency of the problem, its manageability from the point of view of finances and staff available to ACIR, and the extent to which the Commission can make a fruitful contribution toward the solution of the problem.

After selecting specific intergovernmental issues for investigation, ACIR follows a multistep procedure that assures review and comment by representatives of all points of view, all affected levels of government, technical experts, and interested groups. The Commission then debates each issue and formulates its policy position. Commission findings and recommendations are published and draft bills and executive orders developed to assist in implementing ACIR policy recommendations.